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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT, OF OHIO.

REPORTED BY
EMILIUS O. RANDALL,
SUPREME COURT REPORTER.

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**JUDGES OF THE
SUPREME COURT OF OHIO.**

**For the time commencing February 9, 1902, and ending
February 9, 1903.**

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO
JANUARY TERM, 1902.

HON. MARSHALL J. WILLIAMS, CHIEF JUSTICE.		
HON. JACOB F. BURKET,	}	JUDGES.
HON. WILLIAM T. SPEAR,		
HON. WILLIAM Z. DAVIS,		
HON. JOHN A. SHAUCK,		
HON. JAMES L. PRICE.		

THE BELLAIRE STOVE CO. v. THE MIDLAND STEEL CO.

*Contract settled by correspondence—Order given in pursuance
thereto—Cannot change the contract, when.*

All the terms of a contract being definitely settled by correspondence, an order given by one of the parties pursuant thereto should not be regarded as changing the contract, unless such change clearly appears to be intended.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Belmont county.

The Steel Company brought suit in the court of common pleas to recover of the Stove Company on the following account:

Bellaire Stove Co. v. Midland Steel Co.

8032	482	shts,	10x15 $\frac{7}{8}$ x21 $\frac{1}{4}$,	weight	6,390
508	"		12x16 $\frac{7}{8}$ x27 $\frac{1}{8}$,	"	6,909
477	"		14x18 $\frac{3}{8}$ x32 $\frac{3}{4}$,	"	6,193
503	"		16x19 $\frac{1}{8}$ x36,	"	6,005
449	"		18x21 $\frac{1}{4}$ x40 $\frac{3}{4}$,	"	5,339—30,796
Price					\$3.30, amount \$1,016 27
Less freight, 30,100 lbs. @ 12c.....					36 12

Stove Body.	Total.....	\$ 980 15
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The case coming on for trial upon issues joined, it appeared that the controversy arose out of a contract entered into by the correspondence following:

Muncie, Ind., 2-27th, '99.

Bellaire Stove Co., Bellaire, Ohio:

Gentlemen—Replying to your letter of the 25th inst., beg to state we make a specialty of very fine polished body steel for oak stoves, being soft, smooth and a solid even color throughout the sheet. We, also, guarantee it to stand beading without scaling. Our price on this stock in No. 18 gauge would be \$3.30 delivered.

Soliciting your order, we are, yours truly,

MIDLAND STEEL COMPANY,

(Signed)

R. J. BEATTY.

Muncie, Ind., 3-9th, '99.

Bellaire Stove Works, Bellaire, Ohio:

Gentlemen—We received your inquiry about ten days ago for price. We quoted you a very favorable figure for our polished oak stove body material. We are today sending you sample. Please examine same and see if you cannot give us your order, as we are entirely sure we are offering you material you could not buy elsewhere.

Yours truly,

MIDLAND STEEL COMPANY,

(Signed)

R. J. BEATTY.

Bellaire Stove Co. v. Midland Steel Co.

Bellaire, O., 3-17, 1899.

Midland Steel Co.:

Will accept proposition on 18 iron; will want five thousand bodies. Will mail sizes. Wire answer.

(Signed)

BELLAIRE STOVE CO.

Muncie, Ind., March 17, 1899.

Bellaire Stove Co., Bellaire, Ohio:

We have booked your order for five thousand oak stove bodies.

(Signed)

MIDLAND STEEL CO.

Muncie, Ind., March 23, 1899.

Bellaire Stove Co., Bellaire, Ohio:

Gentlemen—We received your telegram on the 17th accepting our quotation and advising that you would require 5,000 bodies. You also stated that you would mail sizes. Up to this writing we have not received them. As this is an extremely busy time of the year would suggest that you send these sizes in at once so as to give us as much time as possible to get them out.

Yours truly,

(Signed)

MIDLAND STEEL COMPANY.

Bellaire, O., March 27, 1899.

The Midland Steel Co., Muncie, Ind.:

Gentlemen—Please ship us 200 each of the following sizes May 1, 200 June 1, 200 July 1, 200 August 1, and 200 September 1:

No. 10— $15\frac{7}{8} \times 21\frac{1}{4}$.

No. 12— $16\frac{7}{8} \times 27\frac{1}{2}$.

No. 14— $18\frac{3}{8} \times 32\frac{3}{4}$.

No. 16— $19\frac{1}{8} \times 36$.

No. 18— $21\frac{1}{4} \times 40\frac{3}{4}$.

Yours very truly,

THE BELLAIRE STOVE CO.,

H. ROEMER, Sec. and Treas.

Muncie, Ind., 3-29th, '99.

Bellaire Stove Works, Bellaire, Ohio:

Gentlemen—Receipt is hereby acknowledged of your order of the 27th inst., calling for 5,000 sheets polished stove body steel. We note you call for shipment of 1,000 sheets Aug. 1st. We would have to make this shipment with the quantity for July 1st, as we will be closed down during the month of July on repairs, stock taking, etc. Same will receive our best attention and you will get very fine material.

Yours truly,

MIDLAND STEEL COMPANY,

(Signed)

R. J. BEATTY, President.

Other correspondence conducted after the controversy arose, in no way affects the terms of the contract. Prior to the conclusion of this correspondence plaintiff had sent to the purchaser a sample of 18 gauge iron but none of any other gauge. The plaintiff, construing the numbers prefixed to the sizes given in the defendant's letter of March 27, 1899, as indicating gauges, or thickness, instead of sizes, of plates, shipped a quantity of material of the gauges of 10, 12, and 14, which being too thick for the defendant's use, were not accepted. The plaintiff offered testimony to show that it is customary to prefix numbers indicating gauges to sizes, and that others accustomed to dealing in the same articles would have interpreted the letter of March 27, 1899, as it did. That evidence was excluded. The court instructed the jury that the correspondence constituted a contract which it was its duty to interpret and that by the contract so entered into the defendant became bound to accept and pay for 18 gauge sheets and none other. The ver-

dict and judgment in the common pleas were for the defendant, a motion for a new trial being overruled.

The motion was upon the three grounds following:

First—For error of law occurring at the trial and excepted to by the plaintiff.

Second—For error of the court in rejecting testimony offered by the plaintiff.

Third—The court erred in its charge to the jury.

This judgment was reversed by the circuit court for error in overruling the motion for a new trial.

Mr. George Duncan and *Mr. C. L. Weems*, for plaintiff in error.

Messrs. Driggs & Heinlein and *Mr. J. A. Gallagher*, for defendant in error.

BY THE COURT:

It is not to be supposed that either the learned judges of the circuit court or counsel for plaintiff in error deny the duty of the court to determine the meaning of a contract into which the parties have entered, or that they regard evidence of usage as competent to vary the unambiguous terms of a contract. Their view appears to be that the trial judge erred in regarding the contract as too clear to be affected by evidence of usage and in giving to it the conclusive effect which required a verdict for the defendant. Attention to the negotiation of the parties seems fully to justify the view of the contract which was taken by the trial judge. The vendor furnished a sample of an 18 gauge sheet and none other. It gave the price of that gauge and none other. The purchaser's communication of March 17, 1899, was a definite acceptance of the proposition for sheets of that gauge, leaving nothing for future determination or information except

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the sizes of the required sheets. That communication and the vendor's letter of March 23d, show that in the minds of both the gauge was fully determined, and that nothing remained to be done except for the purchaser to furnish information as to the sizes required. Nor did the letter of March 27th modify the terms of the contract so definitely settled. By its express terms it was but a compliance with the vendor's request and the purchaser's promise to furnish the "sizes" of the sheets desired.

Judgment of the circuit court reversed and that of the common pleas affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

JOHNSON v. THE NORTH BRITISH & MERCANTILE
INSURANCE CO.

Agent of fire insurance company—Not presumptively authorized to receive notice of cancellation of policy, when—Assent of would-be principal of no effect—Where act done by one professing no authority of agent and having none—Law of agency.

1. One engaged in a general fire insurance business, representing a number of companies, may be authorized by an owner desiring to keep his property insured, to accept for him the company's notice of cancellation of an existing policy and thereupon to write the risk in another company. Such authority may be directly given, or may be inferred from a course of dealing between the parties involving such transactions. But there is no presumption that the agent to procure a policy of insurance has authority, after he has procured and delivered it to the insured, to receive notice of cancellation and discharge the policy.

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2. Ratification of an act done without authority can be effectual only where the act is done by one professedly acting in the name of the party sought to be charged as principal, or for his benefit. And where the one who does the act neither has nor professes to have authority to represent another, the subsequent assent of such other to be bound as principal has no operation.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Belmont county.

The action below in the common pleas of Belmont was by plaintiff in error, Isaac Johnson, against the defendant in error, the North British & Mercantile Insurance Company, upon a fire policy covering dwelling-house, barn, household goods and farming utensils. A jury being waived, the cause was submitted to the court on the pleadings and an agreed statement of facts. The pertinent facts are as follows:

1. July 1, 1897, one W. O. Chappell was the general agent at Barnesville, Ohio, for several insurance companies, including the Hartford of Hartford, Connecticut, and the defendant, the North British.

2. On the day named, Johnson, who was then the owner of and lived upon a farm near Atlas, Belmont county, on the street in Barnesville, applied to Chappell for insurance on his farm buildings and contents. He was told the rate of premium, and promised to call at Chappell's office, but did not do so.

3. On the next day Chappell went to Johnson's farm to secure the insurance. They had a general consultation in which Chappell told Johnson what companies he represented, asked Johnson in what company he wished to be insured. Johnson answered that it made no difference to him, but to place him in some good company. Johnson paid Chappell ten dol-

lars on account of premium, which was to be \$13.50. The insurance was then finally agreed upon.

4. July 5th, Chappell issued and mailed to Johnson policy number 20065 in the Hartford, and notified the company. The written description and printed parts were similar to that of the policy in suit. Johnson duly accepted and held the policy until after the fire.

5. The Hartford Company, by letter received by Chappell on the 20th, directed him to cancel its policy, and accordingly, on July 28th, Chappell went to Johnson's to take it up and cancel it. Not finding Johnson at home he requested a son, a lad of about sixteen, residing on the farm with his father, to tell his father to come to his (Chappell's) office that week and bring the policy; that he desired to change the insurance to another company. The son never informed his father of the request. Johnson never had, until after the fire, any notice or knowledge that the company desired, or that Chappell was directed, to cancel the policy.

6. On July 29th Chappell wrote the company that he had been to Johnson's home to get their policy, and cancel it, but that Johnson was not at home, and that he left instructions with his son for its return.

7. On July 28th Chappell wrote on his policy ledger a cancellation of the Hartford policy, and wrote the policy in suit in the North British in all respects similar to the Hartford policy, save that it was not to take effect until the third day of August following. At the same time he entered the North British policy upon his policy register, and made his daily report of the same to the Company.

8. August 4th, a fire occurred and the barn building and contents described in both policies were totally destroyed.

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9. August 5th, Chappell, having heard of the fire, went to Johnson's house. Having been absent from home for four days he did not know whether Johnson had surrendered the Hartford policy, and wanted to ascertain as to it. Johnson was ill and could not be seen. Learning this, Chappell asked a son, a man about twenty-four years of age, for the policy, stating that he must have it, but did not state that he had placed the insurance in another company, nor that the policy had been ordered canceled. The young man then delivered the policy to Chappell. Johnson had no knowledge that the policy had been so delivered nor had the son authority to deliver it.

10. Some time after the fire, Johnson called at Chappell's office to get the Hartford policy, but Chappell not being in, returned home without receiving it. At that time he had no knowledge that any other policy had been written. The policy in suit was delivered to Johnson August 10th. No part of the ten dollars paid by Johnson was returned to him, nor was there any offer on the part of the Hartford Company, or any of its agents, to return the same. He did not ask as to its return, nor did he pay or offer to pay any of the premium for the North British policy.

11. Johnson never had, at any time before the fire, notice in any way that his policy in the Hartford had been ordered canceled.

12. In dealing with each company Chappell charged himself with the full amount of the premium.

13. August 7th, Chappell notified the defendant company of the loss, and the company responded that its state agent Bell had been instructed to attend to adjustment. Bell thereupon went to Atlas to adjust the loss and then learned from Johnson of the issuing of the Hartford policy, which was the first notice he or

the company had of that fact. Johnson at the time supposed Bell was the adjuster of the Hartford Company. Thereupon the defendant company being informed by Bell of the previous issuing of the policy to Johnson in the Hartford, denied liability for the loss.

14. September 27th, Chappell sent \$11.47 to the defendant company in payment of the premium on the policy, which sum was returned by the company.

15. The policy issued by the Hartford Company contained the following stipulation, regarding cancellation, viz.:

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium."

16. The policy of the North British Company (the one in suit) contained the following provision regarding other insurance, viz.:

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

17. No other provision was endorsed on said policy or added thereto regarding other insurance, nor was any other agreement of any kind made upon the subject.

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The court found the issues for the plaintiff and assessed the damages at \$903.86, for which judgment was rendered against the defendant. This judgment was reversed by the circuit court on the ground that the finding and judgment of the common pleas is not sustained by the evidence as shown by the agreed statement of facts and that the same is contrary to law. The plaintiff brings error.

Mr. Thomas A. Logan and Messrs. Petty & Crew, for plaintiff in error, cited the following authorities:

Palm v. Insurance Co., 20 Ohio, 529; *Krumm v. Insurance Co.*, 40 Ohio St., 225; *Machine Co. v. Insurance Co.*, 50 Ohio St., 549; *Assurance Co. v. Benner*, 56 Ohio St., 748; *Insurance Co. v. Shoemaker*, 1 O. S. C. D., 48; 22 W. L. B., 315; *Dibble v. Assurance Co.*, 70 Mich., 1; *Ruggles v. Insurance Co.*, 114 N. Y., 415; *Ellis v. Insurance Co.*, 50 N. Y., 402; *Toy Manufacturing Co. v. Insurance Co.*, 52 N. W. Rep., 866; *Putnam v. Insurance Co.*, 123 Mass., 324; *Pitney v. Insurance Co.*, 65 N. Y., 6; *Insurance Co. v. Lambert*, 26 Ore., 199; *Northrup v. Insurance Co.*, 48 Wis., 420; *Insurance Co. v. Hartwell*, 123 Ind., 177; *Schauer v. Insurance Co.*, 88 Wis., 561; *Ostrander on Ins.* (2 ed.), 169; *Standard Oil Co. v. Insurance Co.*, 64 N. Y., 85; *Stone v. Insurance Co.*, 105 N. Y., 543; *Ikeller v. Insurance Co.*, 53 N. Y. Supp., 323; *Karelsen v. Fire Office*, 122 N. Y., 545; *Hamm Realty Co. v. Insurance Co.*, 83 N. W. Rep., 41; *Pollock v. Cohen*, 32 Ohio St., 514; *Serviss v. Stockstill*, 30 Ohio St., 418; *Cincinnati v. Anchor White Lead Co.*, 44 Ohio St., 243; *Clarke v. Insurance Co.*, 21 Ins. L. J., 281; *Insurance Co. v. Nill*, 114 Pa. St., 248; *McAlister v. Insurance Co.*, 101 Mass., 558; *Grace v. Insurance Co.*, 109 U. S., 278; *Frank v. Jenkins*, 22 Ohio St., 604; *Christy*

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v. *Douglas*, Wright, 485; *Whitehead v. Insurance Co.*, 102 N. Y., 143; *Wilson v. Forder*, 20 Ohio St., 89; 1 Joyce on Ins., Secs. 463 and 642; *Mitchell v. Fire Association*, 48 Minn., 278.

Messrs. Driggs & Heinlein, for defendant in error, cited the following authorities:

Kimball v. Insurance Co., 17 Fed. Rep., 625; *Goddard v. Insurance Co.*, 108 Mass., 56; *Insurance Co. v. Young*, 90 U. S. (23 Wall.), 85; *Trustees v. Insurance Co.*, 28 N. Y., 153; *Strong v. Insurance Co.*, 37 Wis., 625; *Elison v. Henshaw*, 17 U. S. (4 Wheat.), 228; 1 Joyce on Ins., Sec. 636; *Hermann v. Insurance Co.*, 100 N. Y., 411; *Rothschild v. Insurance Co.*, 41 Am. Rep., 303; *Grace v. Insurance Co.*, 109 U. S., 278; *Van Wein v. Insurance Co.*, 52 N. Y. Sup. Ct., 494; *Stilwell v. Insurance Co.*, 72 N. Y., 385; *Insurance Society v. Insurance Co.*, 84 Va., 116; *White v. Insurance Co.*, 120 Mass., 330; *Rody v. Insurance Co.*, 53 Wis., 157; *Van Valkenburg v. Insurance Co.*, 51 N. Y., 465; 1 Joyce on Ins., Secs. 636, 637, 638, 639; *Insurance Co. v. Nill*, 114 Pa. St. 248; *McAlister v. Insurance Co.*, 101 Mass., 558; 3 Joyce on Ins., Secs. 2457 and 2458; *Sun Fire Office v. Clark*, 53 Ohio St., 414, 427; *Insurance Co. v. Kelly*, 24 Ohio St., 345; *Insurance Co. v. Railroad Co.*, 28 Ohio St., 69; 3 Joyce on Ins., Sec. 2487; *O'Leary v. Insurance Co.*, 100 Iowa, 173; *Insurance Co. v. Fellows*, 12 Re., 584; 1 Disn., 217; 1 Joyce on Ins., Sec. 463; *Mitchell v. Fire Association*, 48 Minn., 278; *Bigelow on Estoppel* (2 ed.), 419; *Bocock v. Pavey*, 8 Ohio St., 270; *Davis v. Insurance Co.*, 95 Wis., 542; *White v. Insurance Co.*, 120 Mass., 230; *Insurance Co. v. Hartwell*, 100 Ind., 566; *Broadwater v. Insurance Co.*,

34 Minn., 465; *Quong Tue Sing v. Insurance Co.*, 86 Cal., 566; *Grace v. Insurance Co.*, 109 U. S., 278; *Body v. Insurance Co.*, 63 Wis., 157.

SPEAR, J. That the agreed premium had not all been paid, nor any part of it directly to the North British Company, and that the North British policy was not delivered to Johnson before the fire, are believed not to stand in the way of a recovery, for neither was a condition precedent to the taking effect of the policy. *British Ins. Co. v. Lambert*, 26 Ore., 199; *Machine Co. v. Insurance Co.*, 50 Ohio St., 549.

But one of the defenses interposed, and the one specially insisted upon, is that the plaintiff at the time of writing the policy in suit and at the time of the fire, had insurance on the same identical property, for the same identical amount as specified in the policy in suit, in violation of the contract respecting other insurance, and that if the policy sued on be otherwise valid, it is rendered void by reason of the facts here stated.

This proposition is met by the plaintiff with a denial that there had been any violation of the terms of the policy sued upon because the policy in the Hartford company had been canceled prior to the issuing of the North British policy. That the Hartford company endeavored to obtain a cancellation of its policy admits of no denial, and the question is whether or not that effort was effectual. It is contended by plaintiff that it was: 1. Because under the contract between Chappell and Johnson, he became the agent of Johnson for the purpose of keeping the property insured for three years in a good company, which gave him authority to do whatever was necessary to secure that object, and the cancellation of one policy (the

company refusing to carry it) and the writing of another were necessary acts in the performance of that duty, and hence the act of Chappell in that behalf was in law the act of Johnson. 2. And if this be not so, yet when Johnson, being apprised of all the facts, elected to claim under the North British policy, that was an election to treat the Hartford policy as rescinded and of no effect; that it was, in other words, a ratification of the act of Chappell in canceling the Hartford policy.

1. Agency of Chappell. It is not doubted that the legal effect of the transaction was to make Chappell the agent of Johnson to procure for him a policy of insurance on his property for three years in a good company. This office he might properly undertake to perform, inasmuch as its performance did not conflict with his duties to the companies which he represented. He could not serve two masters whose interests were incompatible, but he could properly serve both parties so long as the duties were consistent. *British Ins. Co. v. Lambert, supra*; *Northrup v. Insurance Co.*, 48 Wis., 420; *Insurance Co. v. Harticell*, 123 Ind., 177; *Schauer v. Insurance Co.*, 88 Wis., 561. Hence he might be regarded as the agent of Johnson in procuring a policy in any of the companies he represented, and the authority might be held to go further than this if warranted by the facts. Indeed it has been so often held that an insurance agency, representing several companies, with authority to act on applications and issue policies, as well as to cancel the same in proper cases, may also act as the agent of the insured in waiving notice of cancellation, and in accomplishing the delivery of a new policy when substituted for the one canceled, that the proposition may be regarded as settled law. And

it has been also held that "such agency may be established by a long course of conduct and uninterrupted custom, without express authority being conferred either in writing or by parol." *Hamm Realty Co. v. Insurance Co.*, 80 Minn., 139; *Schauer v. Insurance Co. supra*. But the disputed question in the case at bar is, do the facts justify the conclusion that authority to accept notice of cancellation for Johnson was given? Certainly it is not to be inferred from any long course of dealing, for it does not appear that the parties had between them but the one transaction. Nor do the facts found disclose any actual intention to clothe Chappell with power to act for Johnson beyond the procuring of the policy. It does not appear that the minds of the parties, or either of them, was directed to that matter. Not a word was said on the subject. Indeed the conduct of Chappell would imply that he did not, at the time, suppose that he had authority to act for Johnson in the matter of cancellation. The distinct finding is that, on receiving direction to cancel the Hartford policy he "went to Johnson's to take it up and cancel it," but did not get the policy, Johnson being absent, and then wrote the company that "he had been to Johnson's home to get their policy and cancel it but Johnson was not at home," etc. If he had understood that he had authority to waive the five days' notice for Johnson and consent to the cancellation, it is hardly probable that he would have delayed acting upon it for eight days (from the 20th to the 28th), or would have then informed the company of his failure to see Johnson and procure the policy, or would have neglected to inform it of his act in writing a cancellation on his policy ledger. The meat of the question then is whether the agency of Chappell to procure

insurance for Johnson is presumed to continue for the purpose of canceling the policy procured by him, or receiving notice of such cancellation? We think that, both on reason and authority, the question must be answered in the negative. An agent to procure a contract has no power to discharge it implied from the original authority merely, for authority to make a contract can not be held to imply authority to destroy it. And the rule is well established that where one is specially employed to procure insurance on certain property the agency terminates with the procurement of the policy. See, among many authorities, the following: *Grace v. Insurance Co.*, 109 U. S., 278; *Kehler v. Insurance Co.*, 23 Fed. Rep., 709; *Insurance Co. v. Sammons*, 110 Ill., 166; *Assurance Soc. v. Insurance Co.*, 84 Va., 116; *Insurance Co. v. Nill*, 114 Pa. St., 248; *Broadwater v. Lyon Ins. Co.*, 34 Minn., 465; *Quong Tue Sing v. Assur. Corp.*, 86 Cal., 566; *Von Wein v. Insurance Co.*, 52 N. Y. Sup. Ct., 490; *Rothschild v. Insurance Co.*, 74 Mo., 41; *Stillwell v. Insurance Co.*, 72 N. Y., 385; *Hermann v. Insurance Co.*, 100 N. Y., 411; *Body v. Insurance Co.*, 63 Wis., 157; *Lumber Co. v. Insurance Co.*, 95 Wis., 542.

Attention is called by counsel for plaintiff in error to the unreported case of *Germania Fire Ins. Co. v. Shoemaker*, 1 O. S. C. D., 48, error to the circuit court of Hancock county, decided by this court October 29, 1889, adversely to the company. In that case the owner applied to the agent for two policies, leaving it to the latter to select the companies. He selected the German and the Kenton, but expressed doubt whether the latter would accept, and it was then arranged between them that the policies should be written in the two companies, but if the Kenton

should refuse, then that policy should be canceled and an equally good one should be substituted; and the two policies were then written and delivered. The Kenton, on being notified, did refuse, and that policy was thereupon canceled, and a policy written in the Germania, also represented by the agent. The agent thereupon mailed a postal card to the insured advising of the cancellation and of the writing of the Germania policy, which card was received by the latter before the fire. It is entirely clear that this decision cannot aid the counsel's contention.

The provision of the Hartford policy respecting cancellation required five days' notice to the insured, which notice was not given. Unless the act of Chappell, in writing a cancellation on his policy ledger binds Johnson, it is difficult to see why the Hartford policy did not continue in force until the fire.

2. Did the election of Johnson to sue on the North British policy have the effect to ratify the act of Chappell in entering a cancellation of the Hartford policy on his policy ledger, and if so, could that ratification affect the defendant Company? We think this question, also, must receive a negative answer. Assuming, without holding, that such election to sue would in any case be a sufficient ratification, in the present case Chappell did not purport to act for Johnson, nor assume to have authority to do so. To cause an unauthorized act to be validated by subsequent ratification, it must appear to have been done in the name of, or for the benefit of, a principal. That a ratification is effectual only when the act is done by one professedly acting as the agent of the party claiming to have been the principal, is held in *Mitchell v. Fire Assn.*, 48 Minn., 278. See also Joyce on Ins.,

Sec. 463; Huffcut on Agency, 30; Mechem on Agency, Sec. 127, and authorities cited; and Wharton on Agency, Sec. 62.

Another consideration deserves attention. At the time the claimed ratification took place the rights and liabilities of the parties had, by the terms of the contracts themselves, become fixed, and whether, in any case, intervening rights of third persons could be injuriously affected by subsequent ratification, it is not too much to say that to have that effect the intent to ratify, and the sufficiency of the ratification, should be clearly shown. Ordinarily the ratification relates back to the time of the act ratified, but in *Pollock v. Cohen*, 32 Ohio St., 514, it is held that: "Where, however, intervening rights have been acquired by a third party, such intervening rights cannot be injuriously affected by the ratification," citing Wharton, Secs. 77, 78; Paley's Agency, 345; *Taylor v. Robinson*, 14 Cal., 396; *Wood v. McCain*, 7 Ala., 800; *Fiske v. Holmes*, 41 Me., 441; *Parmelee v. Simpson*, 72 U. S. (5 Wall.), 81. Whether the principle announced in *Pollock v. Cohen*, *supra*, is or not controlling under the circumstances of this case, we are satisfied that, upon all the facts, the plea of ratification cannot avail the plaintiff in error.

Our conclusion is that the Hartford company's notice to Chappell of its desire to cancel the policy was not notice to Johnson, and inasmuch as the company had not availed itself of its right to cancel by proper notice to the insured, the policy remained in force at the time of the fire. This contention being determined against the plaintiff we see no escape from the conclusion that the Hartford policy constituted other insurance on the property within the meaning of the clause in respect to that matter in the policy

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in suit, and that the existence of a contract of other insurance without complying with the provisions of the policy of the defendant Company rendered its policy void at its election, and that, having elected, on first being informed of the facts, to treat the contract as void, the Company cannot be held. *Insurance Co. v. Railroad Co.*, 28 Ohio St., 69; *Sun Fire Office v. Clark*, 53 Ohio St., 414.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

CITY OF CANTON v. SHOCK ET AL.

Riparian rights—Municipality a riparian proprietor—May use water needed from stream flowing by—Lower proprietor on same stream no legal cause for complaint—When water insufficient for both, each entitled to reasonable use—Neither to exclude the other—Equitable division of use, question for jury.

1. An incorporated municipality situated on a natural flowing stream, is, in its corporate capacity, a riparian proprietor, having the rights, and subject to the liabilities, of such proprietor.
2. Such municipality so situated has the right to use out of such stream all the water it needs for its own proper purposes, returning to the stream the water not consumed in such use.
3. Such municipality so situated, may supply water to its inhabitants for domestic use, returning to the stream the water not consumed; and a lower proprietor who uses the water of the same stream for power, has no legal cause for complaint against such upper proprietor for so using the water of the stream.
4. Where there are upper and lower proprietors upon a natural running stream, both having manufactories propelled by the water of the stream, and the water is insufficient to fully supply the needs of both, each one has a right to the reasonable use of the water, considering all the circumstances.

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5. In such cases the water of the stream should be so divided and used that each proprietor shall bear his fair proportion of the loss caused by the shortage of water, considering all the circumstances of the case.
6. Such municipality so situated, has no right to materially diminish the flow of water in such stream, to the injury of a lower proprietor, by supplying water from the stream to persons outside of such municipality, or to be transported away from such city, or by supplying to manufactories for power purposes more than a reasonable share of the water, considering all the circumstances.
7. In case of difference between such proprietors as to the use of water for power purposes, the question should be left to a jury to say whether under all the circumstances the party complained against has used more than his fair proportion of the water of the stream.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Stark county.

The city of Canton is a municipal corporation and is situated between the east and west forks of Nimi-shiller creek, the forks meeting at or near the south line of the city and thus forming that creek. The entire natural drainage of the city is toward, and into these two forks of the creek, which is a natural water-course.

The city has established its system of water-works on the west branch of the creek, on a lot of land adjoining said branch, and it takes its water supply from said creek, and from certain wells near the same, and from Myers' lake nearby. The city uses so much of the water supply thus passing through its water-works, as it needs for its use as a city, and supplies its inhabitants with water for domestic, commercial and manufacturing purposes, at a price fixed by the city, so as to produce an income about sufficient to pay the expenses of said water-works.

The defendants in error own a water-power grist mill located on the creek a short distance down stream south of the city, and have used the water of the creek for many years—over fifty—as power to run their mill, and until about the year 1887 there was sufficient water to supply both the city and the mill, but as the city grew and extended its water-works, it used larger quantities of water, and thereby the supply to the mill became reduced to such an extent that in dry seasons of the year, there was not sufficient water to run the mill all the time, and it became necessary to shut down at nights.

Thereupon in the year 1898, the defendants in error, plaintiffs below, commenced an action against the city in the court of common pleas, seeking to recover damages from the city for thus using the water, and thereby diminishing the supply to the mill. The city claimed to be a riparian owner and entitled to make such use of the water of the stream as it had made, and that the plaintiffs below had no greater right to the use of the water to run their mill, than the city and its inhabitants had to use the waters of the creek above the mill, for domestic, commercial and manufacturing purposes.

Upon the trial of the case these questions were put in issue by the pleadings and evidence. Thereupon the court charged the jury as follows:

“On the question of the right of the city to take this water for the purposes named, the defendant claims that substantially all the water diverted by it from the creek in question, and which was not returned to said creek, was used for the purpose of supplying the inhabitants of the city and a small portion of territory adjoining thereto, with water for domestic, sanitary, agricultural and manufacturing purposes. That

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said stream does now and for many years has passed in and through the corporate limits of said city. That it owns the premises upon which its pumping station is situated, and has lines of pipe proceeding from said creek and pumping station, and passing through the city to supply said persons, and that it is in a sense, a riparian owner, located on said stream, and it claims that the inhabitants of said city so supplied by it, have the rights of riparian owners in said stream; that is to say—the right to use the same for domestic, agricultural, sanitary and manufacturing purposes; and I am requested by defendant counsel to say to you as matter of law that if these facts are true, and if the water so drawn from said stream and not returned to it so as to be effective for plaintiffs' water power, was substantially all consumed by the citizens of said city and territory adjoining thereto, for the purposes and uses aforesaid, and if their uses were reasonable in manner and extent; then the city would not be liable to the plaintiffs, although such use might so diminish the volume of said stream, that at certain times of the year it would cause a substantial diminution of plaintiffs' water power.

"I say, I am asked by defendant's counsel to so instruct you, but I cannot so instruct you as matter of law. On the contrary, I say to you as a matter of law, that the undiminished flow of a natural private stream, such as the one in question, is conceded to be, is the right of every riparian owner, yet this right is limited to this extent; that each riparian owner may without subjecting himself to liability to another lower riparian owner, use of the stream whatever is needed for his own domestic purposes and the watering of stock. The defendant, the city,

cannot be considered a riparian owner within the scope of this exception."

The city saved exceptions to this part of the charge and to the charge as a whole.

A verdict was returned in favor of plaintiffs below, motion for new trial overruled, judgment entered on the verdict against the city, and a bill of exceptions allowed, signed and made part of the record.

The circuit court affirmed the judgment, and thereupon the city filed its petition in error here, seeking to reverse the judgments below.

Mr. Ed. L. Smith, city solicitor, and *Messrs. Lynch, Day & Day*, for plaintiff in error.

We believe the following propositions of law are indisputable: That in order to generate power or for other artificial purposes there is no ownership or property in the waters of a flowing stream in the sense that there is ownership of land or chattel property. As to running streams the interest or right for such purposes pertains only to its use. All riparian owners have a right to use and consume the waters of a stream for domestic, sanitary and agricultural purposes even though such use would debar a lower riparian owner of any use of such stream. The primary use of waters of a stream is to satisfy the natural wants of mankind and such use is paramount to the right of other riparian owners to use the same stream to supply their artificial wants; for example, the running of a mill. This proposition is supported by the following authorities. Washburn on Easements, 330-1; Angell on Water Courses, Secs. 128-9.

There may have been a time, when there were few villages or towns on the banks of the smaller streams, that the courts were inclined to protect these water rights

for mill powers; for then such streams were supplying abundant water for such powers as well as for the domestic purposes of the inhabitants on the borders of the streams, but as the country became more densely populated and the flow of the smaller streams from natural causes gradually diminished, the use of the water for one or the other of such purposes was necessarily curtailed. There has been no time when the courts have held that the owners of mill powers on streams have superior, or, we submit, equal rights to the use of the water for power with the natural rights of such inhabitants to use it for domestic purposes. Now when the country has become more thickly settled and villages and towns are building up on the borders of the streams, and it is absolutely necessary for the inhabitants to be supplied with good and wholesome water for domestic purposes, they must be protected in their natural rights, as against mill owners who attempt, in this age of cheap steam power, to maintain old imaginary rights to the use of the water for power for their mills as against such natural rights, and surely when such inhabitants combine and pump the water for such use through pipes and reservoirs and charge themselves for the use of the water, only in a sufficient amount to pay the expenses of the pumping and of keeping their water-works and mains in proper working condition, they must not be classed as vendors and water companies doing business for commercial purposes. *Jones on Easements*, Sec. 747; *Barre Water Co. v. Carnes*, 65 Vt., 626.

The theory of natural rights for which we contend is nowhere better stated than in *Mayor v. Commissioners*, 7 Pa. St., 348.

The question was again considered by the Supreme Court of Pennsylvania in *Philadelphia v. Collins*, 68 Pa. St., 106; *City of Elgin v. Hydraulic Co.*, (85 Ill. App., 182) Engineering Record of November 18, 1899; *Pennsylvania Rd. Co. v. Miller*, 112 Pa. St., 34; *Haupt's Appeal*, 125 Pa., 211.

The distinction between public and private streams is more as to the mode of access than as to the use of the water thereof. Public streams are public highways open at all times to access to all persons, but to private streams access must be had at public highways or by lands adjacent to the stream; but as to the ownership of the water there is no distinction, for in neither case is there any private ownership of the water, but in both cases, access having been obtained, the right to use the water is the same. *St. Anthony Co. v. Water Commrs.*, 168 U. S., 349; *Lee v. Lee*, 50 N. W. Rep., 33.

The old notion of riparian rights was that the riparian owner was entitled to the flow of the stream undiminished in quantity and unimpaired in quality, but there are many recent decisions to the effect that what has heretofore been regarded as sacred rights must to a certain extent give way to the public welfare.

In support of this proposition are the following authorities: *Pennsylvania Coal Co. v. Sanderson*, 113 Pa., 126; *Commonwealth v. Russell*, 172 Pa., 506, *Maryfield v. Worcester*, 110 Mass., 216; *Morse v. Worcester*, 139 Mass., 389.

These cases are in a measure departures from the ancient rule, but are based upon modern conditions and public necessity and show the direction the courts are moving in defining the right in the flowing stream, between municipal corporations, where the water is sought to be used to supply the natural wants of its

inhabitants, and a lower riparian owner desiring to use the water for power purposes.

Not only did the court fail to recognize the rule laid down by the authorities herein cited but went to the extent of preventing the jury from considering the question as to whether the city, in the use it was making of the waters of the stream, was using it in a reasonable manner and to a reasonable extent.

That this is a proper question to be submitted to the jury is sustained by the following authorities: Jones on Easements, Sec. 752; *McElroy v. Goble*, 6 Ohio St., 187; *Wadsworth v. Tillotson*, 15 Conn., 365; *Hazeltine v. Case*, 46 Wis., 391; 4 Ill., 494.

Messrs. Webber & Turner and *Mr. A. A. Thayer*, for defendants in error.

The question is: Is a municipal corporation, through which flows a natural, private stream, a riparian owner, in such sense that it may divert all the waters of the stream, for the use of its inhabitants, without compensating lower proprietors, who have been injured thereby?

This question has been so often answered in the negative by the courts, and voluminously considered by text writers, that the simple citation of authorities should be sufficient to settle it. We select from a large number at hand, the following: *Emporia v. Soden*, 25 Kan., 588; *Garwood v. Railroad Co.*, 83 N. Y., 400; *Frobel v. New York*, 164 N. Y., 522; *Plumleigh v. Dawson*, 1 Gilman, 544 (41 Am. Dec., 199); *Elliott v. Railroad Co.*, 10 Cush., 191 (57 Am. Dec., 85); *Tiedeman on Munic. Corps.*, Sec. 354; *Dillon on Munic. Corps.*, Secs. 597, 607; *Gould on Waters*, Sec. 245; *Mills on Eminent Domain*, Sec. 79; *Lewis on Emi-*

nent Domain, Sec. 62; *Coal & Iron Co. v. Tucker*, 48 Ohio St., 41.

BURKET, J. As this is an action against the city for damages, no question as to eminent domain, or appropriation of private property for public uses, is involved in the issue, the controlling issue being as to whether the city, as a municipal corporation, is a riparian proprietor having the right to use the waters of the creek for its own purposes, and to supply them to its inhabitants for the ordinary purposes of life, and as to whether the right to use water from a stream by one riparian proprietor for manufacturing purposes, such as running a grist mill, is inferior or equal to the right to use the water from the same stream by an upper proprietor for domestic purposes.

It is urged by counsel for defendants in error, that a municipality situated on a natural water course, is not in its corporate capacity, a riparian proprietor, and that only those inhabitants whose lots or lands border on the stream are such proprietors, and some cases are cited which seem to take that view of the law.

Other cases are decided upon the theory that such municipality is itself, in its corporate capacity, a riparian proprietor, and entitled as such to riparian rights in the stream upon which it is situated. *Barre Water Co. v. Carnes*, 65 Vt., 626; *Mayor v. Commissioners*, 7 Pa. St., 348; *Philadelphia v. Collins*, 68 Pa. St., 106; Jones on Easements, Sec. 747, and cases cited in a note to the section.

In this state the question remains undecided by this court, and therefore is an open one, and we are at liberty to follow such rule of decision as is supported by sound reason and the weight of authority.

It was held by this court at this term in *City of Mansfield v. Balliett*, 65 Ohio St., 451, that a city situate on a stream is liable in its corporate capacity to a lower proprietor for polluting the water of such stream by running the sewage of such city and its inhabitants into such stream. This case holds the city in its corporate capacity, and as an upper proprietor, liable to a lower proprietor for polluting the water of the stream; and if the city is liable, not only for its own acts, but also for the acts of its inhabitants, in flowing sewage into the stream, it must be upon the principle that as upper riparian proprietor, it has violated its duty toward a lower riparian proprietor on the same stream, and that therefore the city in its corporate capacity is a riparian proprietor on the stream, and must bear the burdens of such position.

While the inhabitants own their lots individually, the city owns the streets, the fire department and all other public property and public works, and in its corporate capacity, provides for the convenience and welfare of its inhabitants, as to streets, fire protection, lighting and supplying water, and in such, and other like matters, the city overshadows the individuals, and stands in its corporate capacity as a single proprietor extending throughout its entire limits, and entitled as such to all the rights and subject to all the liabilities of a riparian proprietor on the stream upon which it is situated.

Sound reason, the weight of authority, and the present advanced state of municipal government, rights and liabilities, require that a municipality should be held and regarded, in its entirety, as an individual entity, having in its corporate capacity the

rights, and subject to the liabilities, of a riparian proprietor, and we so hold in this case.

The bringing of the action against the city for damages is of itself an implied admission that the city in its corporate capacity, is an upper proprietor, liable for the wrongful diversion or use of the water of the stream upon which it is situated. Being charged with the liability of such upper proprietor, as conceded by bringing the action and as was rightly held in the Mansfield case, it must also be accorded the rights and benefits of such proprietor.

As such proprietor, the city uses the water of the stream, through its water-works, in extinguishing fires, sprinkling streets, and other public purposes, and supplies water to its inhabitants for domestic use, and manufacturing purposes.

Being an upper riparian proprietor, it follows as a matter of law that it has the right to use out of the stream all the water it needs for its own purposes, returning to the stream all that is not consumed in such use; not however, transporting the water, as was done in *Pennsylvania Rd. Co. v. Miller*, 112 Pa. St., 34, nor diverting the water as was done in *Wheatley v. Chrisman*, 24 Pa. St., 298.

The right of an upper proprietor to use the water of a stream for manufacturing purposes, is at least equal to the right of a lower proprietor on the same stream to use the water for a like purpose, and so long as the upper proprietor uses the waters reasonably and returns all the water not consumed in the use, back into the stream, the legal rights of the lower proprietor are not invaded.

There being no right of property in the water of a natural flowing stream, the only right being to the use of the water as it flows by the lands adjoining the

stream, it follows that as the water comes first to the upper proprietor, he may use it reasonably for power purposes, returning to the stream all that is not consumed in the use, and that the right of the lower proprietor attaches only to the use of the water that comes to his premises after passing and so serving the purposes of the upper proprietor.

As the right of the city to supply water to manufactories within its bounds for power purposes is only equal to the right of a lower proprietor to use water for the same purpose, the question arises in this case as to the rights of the parties to use the water of the stream for such purposes. The question is a difficult one both in theory and application, as the different sizes of streams, and different circumstances, have caused courts to make different holdings, but the combined result of the cases, seems to be that where there is not sufficient water in a stream to supply fully the needs of all the proprietors on the stream for power purposes, no one has the right to use all the water and thereby deprive those below him from the use of any; nor can those below rightly insist that those above shall use no water for power and thereby save it all for those below. Each should use the water reasonably, and so as to do as little injury to the others as circumstances will permit. As a loss must fall upon one or the other of such proprietors, neither should be compelled to bear the whole loss, but the water should be so divided and used that each one may bear his reasonable proportion of the loss, and that in case of difference between upper and lower proprietors in such cases the question should be left to the sound judgment of a jury, under proper instructions, to say whether the party complained against has used for power purposes, under all the circumstances, more

than his just proportion of the water of the stream. *Evans v. Merriweather*, 3 Scam. (Ill.), 492. .

This being so, the city of Canton, in supplying water to its inhabitants for power purposes, had the right to use the water of the stream to a reasonable extent only, and so as to do as little injury as might be, under all the circumstances, to the lower proprietor, each party bearing an equitable share of the loss caused by the shortage of water. Dry seasons are not caused by either party, but are the act of God, and each party must bear the losses resulting to him therefrom.

From the earliest dawn of history to the present time, the primary use of water has been for domestic purposes, and its secondary use for the purposes of power. People on the upper stream have the right to quench their thirst, and the thirst of their flocks and herds, even though by so doing the wheels of every mill on the lower stream should stand still. *Pennsylvania Rd. Co. v. Miller*, 112 Pa. St., 34, 41. And the same right in the use of water as to quenching thirst, extends to all uses for domestic purposes; and the rights of a lower proprietor to the use of the waters of a stream for power purposes, is subject to the superior right of all upper proprietors for domestic purposes, and must yield thereto.

All water powers on a stream are established subject to the superior right of all upper proprietors to use water out of the stream for domestic purposes, and if the upper proprietors have grown so large, or become so numerous as to consume most, or all of the water, the lower proprietors have no cause of complaint, because it is only what they should have reasonably expected in the growth and development of the country, and subject to which contingency they established their water powers.

In addition to taking water from the stream for its own uses, and supplying the same to its inhabitants for domestic and manufacturing purposes, the amended petition avers that the city supplied water to its inhabitants for commercial purposes. If this means only that the city received pay for the water so supplied, and thereby made the water an article of commerce, the averment is of no force. The city having the right to supply water to its inhabitants for domestic and manufacturing purposes, it can make no difference in that right, that the supply is for pay, rather than for nothing. The injury, if any, to the lower proprietor arises from the taking of the water, and not from the pay received therefor.

It is also averred in the amended petition that the city supplies water to people outside of the city, for domestic, commercial and manufacturing purposes. If such supply to outsiders, or to be transported away from the city for commercial purposes, is sufficient in quantity to materially injure defendants in error, taking into consideration the size of the stream and water supply, the city to that extent is exceeding its right as a riparian proprietor.

The general rule is well stated by Paxson, J., in *Pennsylvania Rd. Co. v. Miller*, 112 Pa. St., 34, 41, as follows: "The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered, and that any interruption of, or interference with, the rights of the lower riparian owner is an injury for which an action will lie, unless too trifling for the law to notice."

The obligation to return the water to the stream without "any essential diminution" means that the water not consumed in the use, or "legal purpose," must be returned to the stream, or an opportunity given for it to flow back into the stream by the ordinary channels. It cannot be lawfully diverted, or transported, so as to prevent it from flowing back into the stream.

The city having no right to materially diminish the flow of the water in the stream to the injury of defendants in error, by supplying water to outsiders, or for commercial purposes to be transported to other parts, or to supply to its inhabitants for power purposes an unreasonable quantity as above pointed out, it follows that if the city has materially diminished the flow of the water in the stream, by so supplying water to outsiders, or for transportation, or unreasonably for purposes of power, that it is liable to respond in damages to the party injured thereby; but for the water consumed by the city for its own purposes, or so supplied to its inhabitants for domestic use, even though it received pay therefor, it is not liable.

The water taken by the city from the stream for its own use, and so supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor, and not by virtue of the right of eminent domain, and therefore no compensation need be made therefor.

The general rule that a lower proprietor is entitled to the natural flow of a stream undiminished in quantity, subject to the lawful use of the water by upper proprietors, has been referred to with approval by this court in several cases: *Columbus & H. Coal & Iron Co. v. Tucker*, 48 Ohio St., 41; *City of Mansfield v. Balliett*, 65 Ohio St., 451. In the Mansfield

case there was no question involved as to the volume or quantity of water, the only question being as to the liability of the city for polluting the waters of the stream, and the right of the lower proprietor to recover damages for such pollution. The case of *Columbus & H. Coal & Iron Co. v. Tucker*, *supra*, was also by a lower proprietor against an upper one, for damages for polluting the waters of a stream.

The question as to the pollution of the waters of a stream in this state seems to be fairly well settled by these two Ohio cases, but they do not determine the relative rights of upper and lower riparian proprietors, as to the use of the waters of a stream, as was so strongly urged by counsel for defendants in error.

The court of common pleas erred in its charge to the jury as to the city being an upper riparian proprietor, and as to its right to use water out of the stream for its own purposes, and as to its right to supply water from the stream to its inhabitants for domestic and manufacturing purposes. The real and only question upon which a liability could be founded, viz., whether the flow of the water in the stream was materially diminished, to the injury of the lower proprietors, by the supplying of water by the city to people outside of its limits, or to be transported away from the city for commercial purposes, or by an unreasonable supply of water for power purposes, seems to have been overlooked, and no charge requested or given on that subject.

The circuit court erred in affirming the judgment of the common pleas. Both judgments will be reversed, and the cause remanded for further proceedings.

Judgments reversed.

SPEAR, DAVIS and SHAUCK, JJ., concur.

THE STATE OF OHIO v. COURTRIGHT.

Indictment for perjury—To warrant conviction—Must be at least one witness to corpus delicti—With corroborating witness or circumstantial evidence—Evidence.

It is a general rule, that to warrant a conviction under an indictment for perjury, there should be at least one witness to the *corpus delicti*, or the falsity of the matter assigned as perjury, and that the testimony of such witness be corroborated, either by another witness, or by circumstantial evidence sufficiently strong to satisfy the jury beyond a reasonable doubt of the guilt of the accused.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Jackson county.

At the February term of the court of common pleas of Jackson county, for the year 1900, the defendant in error was indicted by the grand jury for cohabiting in a state of adultery with one Amanda Butcher. He was placed on trial at a subsequent term, and in making out his defense, he became a witness in his own behalf, and in his testimony under oath, denied all the acts of illicit intercourse charged in the indictment; but he was found guilty and sentenced accordingly.

By another grand jury he was indicted for the crime of perjury, in that he gave false testimony on the former trial wherein he denied the acts of adultery. On the trial for perjury, no witness was produced by the state who testified to the falsity of the matter assigned as perjury, but the state rested its case for conviction, on circumstantial evidence, at the close of which the defendant asked the court to direct a verdict of acquittal. This request was denied, and the defendant introduced his testimony. He was

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found guilty and sentenced to a term of imprisonment, from which error was prosecuted in the circuit court.

The grounds of error relied on, and which were sustained by the court, are in substance:

1. That the trial court erred in refusing to direct a verdict for the accused, at the close of the testimony of the state.

2. The court erred in the charge to the jury.

The circuit court reversed the judgment of the trial court, and remanded the case for new trial and further proceedings. The state now prosecutes error in this court to reverse the circuit court, in order that the sentence may be carried into execution.

Mr. A. E. Jacobs, prosecuting attorney for Jackson county, for plaintiff in error, cited the following authorities:

Beach v. State, 32 Tex. Crim. Rep., 240; *Plummer v. State*, 35 Tex. Crim. Rep., 202; *Crusen v. State*, 10 Ohio St., 258; *Wharton on Crim. Evidence*, Sec. 387; *United States v. Woods*, 39 U. S. (14 Pet.), 430; *Bouvier*, Title Corpus Delicti; 1 *Greenleaf on Evidence*, Sec. 257; *Commonwealth v. Parker*, 2 Cush., 212; *Queen v. Muscot*, 10 Mod., 193; *State v. Raymond*, 20 Iowa, 582; *Underhill Crim. Evidence*, Sec. 469; *Hughes on Crim. Law and Proced.*, Sec. 1660.

Messrs. McGhee & Willis, for defendant in error, cited the following authorities:

Commonwealth v. Parker, 2 Cush., 212; *Iowa v. Raymond*, 20 Iowa, 582; *Underhill Crim. Evidence*, Sec. 468; *Hughes on Crim. Law*, Sec. 1650; 2 *Bishop's New Crim. Proced.*, Secs. 927, 928, 932; *Greenleaf on Evidence*, Secs. 257 and 258; *Galloway v. Indiana*, 29

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Ind., 442; 2 Starkie on Evidence, 262; Roscoe's Crim. Law, (8 ed.); 3 Russell Crim. Law, 791; 3 Rice Crim. Evidence, 791; *Commonwealth v. Butland*, 119 Mass., 317; Wharton's Crim. Law (9 ed.), Sec. 1319; *Montana v. Gibbs*, 10 L. R. A., 749; *Williams v. Commonwealth*, 91 Pa. St., 493; *Crusen v. State*, 10 Ohio St., 258; Sec. 7296, Rev. Stat.; *United States v. Woods*, 39 U. S. (14 Pet.), 430.

PRICE, J. It is conceded in argument and also shown by the record, that on the trial of the defendant in error on the indictment for perjury, the state produced no witness who testified that the matter assigned as perjury was false, but relied for conviction wholly on circumstantial evidence to contradict the sworn statements at the former trial, as well as to make out every other element of perjury. And the absence or lack of such direct or principal witness to the falsity of such sworn statements was the ground of the motion to direct an acquittal in the trial court.

The same question was again raised by exception to the charge of the court, and the two points will be considered together, because, the reason which prompted a refusal to direct a verdict for the accused is found in the instructions given the jury.

Looking to the charge of the court we find two inconsistent views of the law laid down for the guidance of the jury. Each of these views is wrong. One is too strong in favor of the accused, and follows the older English and American authorities, while the other view is opposed to all the authorities, both old and new, and was very prejudicial to the defendant in error. The jury were first told by the court that: "It is a rule of criminal law in the trial of perjury, that you cannot find a man guilty of perjury upon

the testimony of one witness alone, but it must be corroborated by another witness, or if not by another witness, then by circumstances which are practically equivalent to the testimony of another witness. That is to say, if there is only one witness in the case, who testified to that effect, and the defendant having testified to the contrary in the former trial, that is oath against oath, and there can be no preponderance; and not only that, but to overcome the presumption of his innocence, and to satisfy the jury beyond a reasonable doubt as to the falsity of the statement which he is charged to have made, it must be established by one witness who must be corroborated and sustained by another witness, or, by circumstances which practically amount to the same thing."

This language shows the necessity for the one direct witness, and in this respect is correct; but it places the standard of corroborating proof too high as we shall presently see. The corroborating facts and circumstances are not required to be equal or tantamount to the second witness. *Crusen v. State*, 10 Ohio St., 258. This part of the charge, as before stated, was too broad and in favor of the accused; and while he has no occasion to challenge its soundness, it is a subject of just complaint, that the next paragraph of the same charge is not only utterly inconsistent with this, but is also in violation of established rules and principles of practice. In the later paragraph the court wholly abandons the first position taken, and dispensed with the necessity for at least one direct witness to the *corpus delicti*, or falsity of the former testimony, and the jury were told that the lack of this direct witness might be supplied by circumstantial evidence, which should be corroborated by other circumstantial evidence.

Here is a part of what the court said on this subject: "Now, upon this point it is probably true that no witness has testified positively direct to any act of intercourse, but witnesses undertake to detail circumstances and conduct from which the state or prosecution undertakes to say that acts of intercourse took place between these parties.

"Upon this the court says to you, if the witness details conduct or relates a set of circumstances from which the only reasonable conclusion of the jury would be that intercourse must have taken place, in the event that that conduct or circumstance is true, then the witness who testified to that conduct or circumstance from which the jury would necessarily infer intercourse, must be corroborated by another witness or by circumstances which amount to the same thing."

From the language it is clear that the trial court not only dispensed with the essential one witness to the falsity of the former sworn statement — the *corpus delicti*—which was said to be the requisite in the first paragraph quoted, but it is now said that the place of such witness may be supplied by evidence of "conduct or a set of circumstances from which the only reasonable conclusion of the jury would be that intercourse must have taken place;" and that "in the event that that *conduct* or *circumstance* is true, then the witness to that *conduct* or *circumstance* from which the jury would necessarily infer intercourse, must be corroborated by another witness, or by circumstances which amount to the same thing."

It will be observed that the court stated a higher degree of corroboration than is required, and it was done at the sacrifice of the more weighty matter of the law that requires at least one witness to the falsity of

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the matters assigned as perjury; and the jury was instructed in substance, that the office of the one witness may be filled by a witness who testifies as to conduct of the accused, or to a set of circumstances from which guilt might reasonably be inferred, and that if this witness to conduct or set of circumstances is corroborated by a witness who details other, or, it may be the same conduct or circumstances, the accused may be convicted of perjury.

The same error is amplified in the remainder of the charge which we will not quote, but its substance is that the jury might convict of perjury on evidence wholly circumstantial. It has been urged in argument for the state, that on account of the inherent difficulty of proving adultery except by circumstantial evidence, and that on the trial for perjury the same difficulty exists in obtaining a witness to the falsity of the sworn statement wherein the defendant denied all adulterous intercourse, the rule should be relaxed in this case. This suggestion may be answered by the fact that the law permits conviction of adultery, as it does of nearly all other crimes, on purely circumstantial evidence, when it is connected and sufficiently strong to carry conviction beyond a reasonable doubt. But owing to the frailties of human memory, it is possible, notwithstanding such evidence, that the actual illicit intercourse never occurred, and that the accused may have truly so stated as his own witness; so that when he is called upon to meet the charge of perjury in giving such denial of his guilt, his sworn statement to that effect still stands as his evidence, and in addition thereto is the legal presumption of innocence of the perjury, which requires the state to do much more than reintroduce the circum-

stantial evidence upon which he was tried for adultery.

To convict of some great crimes, more or stronger evidence is required than to convict of others. Of such enormity is the crime of treason, that by express statute, unless the accused confess in open court, he shall not be convicted except by the testimony of two credible witnesses to the same overt act laid in the indictment. (See Revised Statutes, Sec. 7298.)

And perjury has always been regarded as an unnatural and heinous crime, because of its tendency to jeopardize person and property and even life, and it may be that our legislature recognized the well established rule which we hold in perjury cases, when it enacted section 7296 of the Revised Statutes, which is: "In trials for seduction under promise of marriage, and on indictments under section 7024, no conviction shall be had on the testimony of the person offended against, unsupported by other evidence to the extent *required as to the principal witness in cases of perjury.*"

Therefore, we consider that when one is charged with the grave crime of perjury, it is but a just safeguard that more than purely circumstantial evidence shall be adduced to establish the *corpus delicti*, and we hold it to be the general rule that the falsity of the matter assigned as perjury must be testified to by at least one witness, and that he be corroborated by another witness, or by facts and circumstances which will operate as a sufficient corroboration. We do not mean by this to say that the guilty knowledge and corrupt motive attached to perjury must be shown by a living witness. These elements of the crime may be established by sufficient and competent circumstantial evidence.

Until now this court has not been called upon to pass directly on the question before us, but in *Crusen v. State*, 10 Ohio St., 258, the view we favor seems to have been fairly recognized. The court say in that case: "On a trial under an indictment for perjury, it is not error for the court to charge the jury that corroborative evidence, in addition to the testimony of one reliable witness, need not be of sufficient force to equal the positive testimony of another witness, or such as would require a jury to convict in a case where a single witness is sufficient; but it (corroborative evidence) must be such as gives a clear preponderance to the evidence in favor of the state, and in view of this rule, establishes the falsity of the oath on which perjury is assigned beyond a reasonable doubt."

It was not in dispute in the case cited that one witness swearing directly to the *corpus delicti* was necessary; but the controversy was over the degree of other proofs requisite to corroborate the direct witness.

Our investigation has led to an examination of the authorities and cases cited by counsel, and many others pertinent to the subject under review, and they all point to one rule as to proof of *corpus delicti*. A result of a review of the decided cases is found in Bishop's New Criminal Procedure, Vol. 2. Sec. 927: "A peculiarity of this offense (perjury) relates to the number and corroboration of witnesses. The doctrine is that, since the testimony alleged to be perjured was delivered on oath, such oath as well as that of the contradicting witness should be regarded on the trial for the perjury. And where the evidence, thus viewed, presents only 'oath against oath,' it will be insufficient. Whence it became the old rule that two witnesses, directly contradicting what the defendant tes-

tified to, are indispensable to a conviction for perjury. But evidently where there is only one witness directly to the alleged falsity of the swearing, there may be something in the case, or brought forward by a witness who cannot speak to the main charge, indicating with reliable distinctness, which of the two contradictory oaths is false. Hence, by the modern rule it is sufficient, either that there are two witnesses, or that the testimony of the one witness is corroborated or sustained by other facts appearing in the case or testified to by other witnesses." The latter rule is fully sustained as the only relaxation of the former more stringent rule requiring two witnesses to the *corpus delicti*.

Indeed we find no case or other authority that sustains the contention of the state; not even a case cited by its counsel. We were referred to section 468 of Underhill on Criminal Evidence, and this is what that author says: "According to the earlier cases, no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two witnesses, the evidence of the second witness being required to overcome the presumption of innocence which the law indulged in favor of the accused. Such is not the law now. The accused may be convicted on the evidence of one witness, which, however, must in all cases be corroborated. The corroboration need not be equivalent or tantamount to another witness. But it must be clear and positive and so strong, that with the evidence of the witness who testifies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt. The direct evidence of the witness may be corroborated by circumstantial evidence. * * *

However, chief reliance is placed by the state on *United States v. Wood*, 39 U. S. (14 Pet.), 430, and we have carefully examined that case, but it does not aid the cause of the state. The most that can be properly claimed for it is, that it provides an exception to the general rule, but we are of opinion that it does not even do that. There, the defendant was indicted under the revenue collection laws then in force, for the crime of perjury, alleged to have been committed by him in swearing or making oath as to the cost of the goods imported and contained in his invoice of the goods purchased of his father in England. On the trial he claimed no conviction could be had without the testimony of a living witness as to the falsity of his oath to the documents. Instead of such a witness, the court permitted documentary evidence to be given, consisting of an invoice book and thirty-five letters from the defendant to his father, by which documents counsel for the government claimed it was shown that the defendant well knew the cost of the goods when he made the false oath of a much lower price. His own written statements—the letters signed by him—were, in one sense, living and direct witnesses to his perjury. They were in the nature of written admissions of guilt. And the court in that case, instead of adopting a different rule, clearly recognized the one so well settled, and said: “The cases in which a living witness to the *corpus delicti* of a defendant in a prosecution for perjury may be dispensed with are: ‘all cases where a person charged with a perjury by false swearing to a fact directly disproved by documentary, or written testimony springing from *himself*, with circumstances showing corrupt intent; all cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant

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when he took the oath, the oath being proved to have been taken; in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or, by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it.' ”

If the Wood case can be construed into an exception, it is such an exception as proves the general rule.

The judgment of the circuit court was right and it is affirmed.

Judgment affirmed.

WILLIAMS, C. J., BURKET, DAVIS and SHAUCK, JJ.,
concur.

THE CLEVELAND CITY RAILWAY COMPANY v. OSBORN.

Action to recover for personal injury—Plaintiff must prove act of culpable negligence, when—Passenger injured by sudden stopping of street car—To avoid collision—Damnum absque injuria.

- 1 In an action to recover for personal injury occasioned by negligence of the defendant, the plaintiff cannot recover by merely proving an act of the defendant which was the proximate cause of the injury; but to authorize a recovery, the plaintiff must also show that such act resulted from culpable negligence by the defendant.
2. Where a passenger on a street railway car was thrown from the car and injured by the sudden stopping of the car in the effort to avoid a collision, and by the shock of a collision which was not brought about by the negligence of the defendant, it is *damnum absque injuria*.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

The defendant in error was a passenger on one of the cars of the plaintiff in error going westward toward the center of the city of Cleveland. The train was composed of two cars, a grip car and a trail car, which were propelled by a cable at a speed not to exceed ten or twelve miles per hour. Defendant in error sat in a single seat on the right hand (north) of the gripman who was operating the car, and to her right was an arm connecting the back of the seat with an upright post supporting the roof of the car. A bakery wagon was proceeding along Superior street, north of the car track and going in the same direction as the train on which was the defendant in error. Dunham avenue is a street running south from Superior street, but it does not cross Superior street. Just before reaching Dunham avenue, an east-bound train passed on the south track and bells were rung; but the attention of the driver of the bakery wagon was directed to the east-bound train so that he did not observe the west-bound train, on which was the defendant in error, and he drove upon and across the north track, directly in front of the west-bound train, intending to go into and along Dunham avenue. The gripman in charge of the west-bound train, in his efforts to avoid a collision with the bakery wagon, caused the train to be suddenly stopped, but it did nevertheless collide with the wagon, whereby the defendant in error, as she alleges in her petition, was violently thrown from the car to the curb of the street and severely injured. There was testimony tending to show that the defendant in error rose from her seat and jumped from the car. The jury returned a verdict for the plaintiff in the sum of \$1,200, and

judgment was rendered therefor, which was affirmed by the circuit court. This proceeding is to reverse the judgments of the circuit and common pleas courts.

Messrs. Squire, Sanders & Dempsey, for plaintiff in error.

Messrs. Foran & Dawley, for defendant in error.

DAVIS, J. The defense that the defendant in error contributed to her injury by jumping off the car must have been rejected by the jury; and the jury must be presumed to have based its verdict for the defendant in error upon a finding that she was thrown from the car by the sudden stopping of the train and by the shock of the collision; for that was the only claim set forth in the petition and supported by any evidence adduced in her behalf. If such a finding discloses actionable negligence on the part of the plaintiff in error, the judgment below should be affirmed, otherwise it must be reversed.

It must be conceded that the proximate cause of the injury to the defendant in error was the sudden stopping of the car, whether the stop was caused by the act of the gripman, or by the collision, or by both together; but the plaintiff in error still is not liable if the sudden stopping, or the collision, was not in a legal sense by its fault. There is no evidence that the collision was occasioned by negligence of the plaintiff in error. The presumption which may be raised from the fact of the collision itself is negatived by the admitted circumstances. The bakery wagon was proceeding in the same direction as the train and suddenly turned across the track, going toward Dunham avenue. The driver of the wagon was watching the east-bound train and did not see the west-bound train.

He did not hear the ringing of the bells when the two trains passed each other just east of Dunham avenue. In this emergency which unexpectedly occurred without his fault, the gripman was bound not only by the duty which he owed to the driver of the wagon, but that which he owed to the passengers behind him, to avoid a collision if possible. With his utmost efforts he only partially succeeded. The horse and driver escaped injury and the wagon was slightly injured. In the effort to avert that which might have cost the life of the driver of the wagon, and perhaps serious injury to the passengers on the car, the defendant in error was, if the finding of the jury was right, thrown from the car and injured. If the gripman had not tried to avoid the collision and the defendant in error had been injured while sitting in the car, the plaintiff in error would have been liable. Now it is claimed that because he did endeavor to avert the collision, he did it too vigorously and that the plaintiff in error should pay for a result which was unusual and which could not have been anticipated. It is true that the plaintiff in error was required to exercise toward the defendant in error, as a passenger, the highest practicable degree of care, or, to state it in another way, the highest degree of care possible under the circumstances; but we are sure that the gripman did no more than he ought to have done, and we are not able to conceive what else he could have done under the circumstances. The jury was not authorized to infer negligence from the proven facts. The judgment of the lower court presents the anomaly of requiring of one the strict performance of an act as a legal duty, yet requiring it at his peril. One cannot do right and do wrong at the same time. The injury to the defendant in error, as she puts it before the court, was a pure

accident, without the elements of negligence or culpability. It is *damnum absque injuria*.

It follows from what has been said that the trial judge committed an error when he refused the request of the plaintiff in error, that he should instruct the jury that, under the testimony in this case, it was their duty to return a verdict for the defendant.

The judgments of the circuit court and of the court of common pleas are

Reversed and judgment is rendered for plaintiff in error.

MINSHALL, C. J., BURKET, SPEAR and SHAUCK, JJ., concur.

[The name of Judge Minshall is found with the concurrences of the above case owing to the fact that it was decided previous to his retirement from the bench February 9th.—Reporter.]

THE CITY OF CINCINNATI v. LEWIS, AUDITOR.

Lands owned by municipality—Not exempt from taxation—Unless used in municipal function—Same when lands leased—Municipal law.

The ownership of lands by a municipal corporation does not bring them within any statutory exemption from taxation unless they are used in the exercise of a municipal function, and this is true although they are leased by the municipality and the money realized is applied to a public purpose.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Hamilton county.

The city of Cincinnati brought suit in the court of common pleas to enjoin the collection of taxes on certain real estate owned by it and described in its peti-

tion. The cause having been determined in the court of common pleas, was appealed to the circuit court where it was submitted on the following agreed statement of facts:

1. That part of the property which is described in the petition, which is now upon the tax duplicate of the county of Hamilton, and on the forfeited list, was appraised for taxation and duly listed therefor by the decennial appraiser of 1890, and the value as returned by him was equalized by the county and state board of equalization, and placed upon the tax duplicate of Hamilton county. That taxes have been charged thereon since 1890, which have not been paid by the plaintiff, and said property became delinquent and subsequently became forfeited to the state of Ohio, in accordance with the statutes.

2. That the property described in the petition was purchased by the city of Cincinnati from Jacob Markley in the year 1872, for the purpose of erecting thereon water-works for the city of Cincinnati; but said water-works was never erected thereon and no buildings were erected thereon by the city. That said property is in Anderson township, Hamilton county, Ohio, and is not within the corporation limits of said city.

3. The property described in the petition before conveyance to the city of Cincinnati was used as a farm. That since on or about the year 1888, to and including the time of the filing of the petition in this case, on January 29, 1897, the said property was in the possession of Jacob Vogel, who rented the same from year to year, and who paid to the city of Cincinnati annually, as rental for said property, as follows:

For the year 1890, \$150; for the year 1891, \$145; for the year 1892, \$120; for the year 1893, \$120; for the year 1894, \$120; for the year 1895, \$120; and for

the year 1896, \$60; that said sums were paid to the water department of the city of Cincinnati, and into the water fund of the city, and used in the maintenance of the water department of the said city. That said property was subrented by Vogel to other persons, and was used by him and them for farming purposes, and the city of Cincinnati did not use the same for any purpose other than to derive therefrom the revenues above set out.

Upon the facts so agreed to by counsel the circuit court held the property to be taxable and dismissed the petition of the city.

Mr. Charles J. Hunt; Mr. Wade H. Ellis and Mr. John V. Campbell, for plaintiff in error.

The exact question raised in the case at bar was answered by this court in the case of *Zumstein v. Coal and Mining Co.*, 54 Ohio St., 264.

The general proposition that the property of a municipality is not subject to taxation unless the purpose to tax is clearly shown by the act of the legislature, is well settled, and is tersely stated by Dillon in his work on *Municipal Corporations* (4 ed.), Sec. 773. *Mayrhofer v. Board of Ed.*, 89 Cal., 114; *Low v. Lewis*, 46 Cal., 549; *People v. Saloman*, 51 Ill., 37; *Directors of the Poor v. School Directors*, 42 Pa. St., 21; *Nashville v. Smith*, 86 Tenn., 213; *Cooley on Taxation*, 130; *Klein v. New Orleans*, 99 U. S., 149; *United States v. Railroad Co.*, 84 U. S. (17 Wall.), 322; *Wharf Co. v. Galveston*, 63 Tex., 14; *People v. Board of Assessors*, 111 N. Y., 505; *West Hartford v. Commissioners*, 44 Conn., 360; *Negley v. Henderson (City)*, 55 S. W. Rep., 554; *Covington v. Commonwealth*, 39 S. W. Rep., 836; *Covington v. Commonwealth*, 173 U. S., 231.

The rule in these Kentucky decisions has been criticised by Dillon in his work on Municipal Corporations, Sec. 774 and note.

Mr. Gideon C. Wilson, county solicitor; *Mr. Otway J. Cosgrave* and *Mr. Oliver B. Jones*, assistant county solicitors, for defendants in error.

It is contended that under this eighth paragraph of Sec. 2732, Rev. Stat., the property described in the petition is exempt from taxation. We contend that said property, never having been and not now being "used exclusively for public purposes," cannot be exempted from its proper burden of taxation.

It has been held that the constitution is imperative in requiring all property not exempt to be taxed, and that its provisions preclude any other exemption than those indicated. *Zanesville v. Richards*, 5 Ohio St., 589.

All property must bear an equal and just proportion of the burden of taxation. *Debolt v. Insurance and Trust Co.*, 1 Ohio St., 563; *Bank v. Bond*, 1 Ohio St., 622; *Telegraph Co. v. Mayer*, 28 Ohio St., 521.

All laws exempting any of the property in the state from taxation, being in derogation of equal rights, should be construed strictly. *Cincinnati College v. State*, 19 Ohio, 110; *Lee v. Sturges*, 46 Ohio St., 153; *Library Association v. Pelton*, 36 Ohio St., 253.

The fact that the income derived from rents or parts of a building not used is devoted exclusively to the objects and purposes of the association, and not used for the benefit or profit of its members, can make no difference.

The law looks to the property as it finds it in use, not to what is done with its accumulations. *Humphries v. Little Sisters of the Poor*, 29 Ohio St., 201.

A municipal corporation may hold property in either one of two capacities, if for the purpose of municipal government, or as necessary and useful for that purpose, it is not taxable; if it is used by the city or enjoyed by it in a social or commercial capacity as a private corporation and for its own profit, it is taxable. Cooley on Taxation, 173; Dillon on Municipal Corporations, 571.

As we have seen, both the constitution and the statutes of Ohio provide that the matter of exemption is determined by the use to which the property sought to be exempted is put. All public property is not exempted from taxation, but only such public property as is *used exclusively for any public purpose*.

This court has so held in a number of cases. *Kendrick v. Farquhar*, 8 Ohio, 189; *Gerke v. Purcell*, 25 Ohio St., 229; *West Hartford v. Water Commrs.*, 44 Conn., 360; *People v. Hess*, 157 N. Y., 42.

The Supreme Court has construed the limits of such exemption. The case of *People v. Chicago*, 124 Ill., 636, is very similar in its facts to the case at bar. *Sanitary District of Chicago v. Martin*, 173 Ill., 243; *Mitchellville v. Supervisors*, 64 Iowa, 554; *Trustees v. Bohler*, 80 Ga., 159; *Brodie v. Fitzgerald*, 57 Ark., 445; *School District v. Howe*, 62 Ark., 481; *School District v. Board of Improvements*, 65 Ark., 343.

The decisions in Kansas are also strong upon the question under consideration. *Washburn College v. Commissioners*, 8 Kan., 344; Sec. 1, Art. 11, of the constitution of the state of Kansas; *Stahl v. Educational Assn.*, 54 Kan., 542; *St. Mary's College v. Crowl, Treas.*, 10 Kan., 442; *United Brethren v. Commissioners*, 115 N. C., 489; *First M. E. Church v. Chicago*, 26 Ill., 482.

The law in Louisiana is to the same effect. *New Orleans v. Judah Congregation*, 15 La. An., 389; *State v. Board of Assessors*, 35 La. An., 668; *Mulroy v. Churchman*, 60 Iowa, 717; *Indianapolis v. Grand Master*, 25 Ind., 518; *Louisville (City) v. Commonwealth*, 1 Duvall (62 Ky.), 295; *Negley v. Henderson (City)*, 55 S. W. Rep., 554; *Covington v. Commonwealth*, 39 S. W. Rep., 836.

We believe that a careful examination of all of the decisions upon these exemptions throughout the different states will sustain our position that it is the immediate use to which the property is put that determines whether or not it is exempt from taxation, and any exemption allowed is only when the property itself is used for governmental purposes or for the purpose of education, charities or eleemosynary institutions, that it is exempt from taxation, and if property is owned by a city and used for other than governmental, such as this property, which is used for farming purposes, or if property owned by a church or other charitable organizations is used for the purpose of producing revenue, which may be ultimately devoted to the purposes of the organizations, that property is not exempt from taxation.

To this effect we cite the following cases:

New Orleans v. St. Patrick's Hall Association, 28 La. An., 512; *State v. Board of Assessors*, 34 La. An., 574; *Redemptionists v. Commissioners*, 50 Md., 449; *Appeal Tax Court v. St. Peter's Academy*, 50 Md., 321; *St. James Institute v. Salem*, 153 Mass., 185; *Salem Lyceum v. Salem*, 154 Mass., 15; *Williams College v. Williamstown*, 167 Mass., 505; *First Christian Church v. Beatrice (City)*, 39 Neb., 432; *People ex rel. Y. M. C. A. v. Sayler*, 32 N. Y. App. Dec., 197; *People ex rel. Catholic Union v. Sayler*, 32 N. Y. App. Dec.,

203; *Sunday School Union v. Philadelphia*, 161 Pa. St., 307; *Philadelphia v. Barber*, 160 Pa. St., 123; *Benevolent Society v. Kelly*, 28 Oregon, 173, where the authorities are exhaustively collected; *Mundy v. Van Hoose*, 104 Ga., 292, citing Ohio cases; *Academy v. Exeter*, 58 N. H., 306; *Yale University v. New Haven*, 71 Conn., 316; *Fitterer v. Crawford*, 157 Mo., 51 (57 S. W. Rep., 532).

SHAUCK, J. From the numerous cases cited in the briefs of counsel it appears to be the general rule that property owned by a municipality and not used in the actual exercise of its municipal functions is subject to taxation. This is for the obvious reason that where the systems of taxation are similar to ours the tax collected is not for the benefit of a municipality alone, but also for that of the state and county. Nevertheless it must be admitted that the conclusions reached upon the subject have been much influenced, if not actually controlled, by the different policies defined by the constitutions and statutes of the several states, it being everywhere conceded that the municipal ownership of property offers no impediment to taxation if that is provided for by law. The policy of this state has its foundation in section 2 of article 12 of the constitution which describes the property which shall be taxed as well as that which may, by general laws, be exempted from taxation: "Laws shall be passed, taxing by uniform rule * * * all real estate and personal property; but * * * public property used exclusively for any public purpose, * * * may, by general laws, be exempted from taxation." That the public ownership of property was not alone thought sufficient to exempt it from taxation is made

obvious by the requirement that an exclusive use for a public purpose shall coincide with such ownership. In the performance of the duty thus imposed upon it, the general assembly has enacted sections 2731 and 2732 of the Revised Statutes. By the former section it is enacted that "all property, whether real or personal, in this state, and whether belonging to individuals or corporations, * * * shall be subject to taxation except only such as may be expressly exempted therefrom." The exempted property is described in the several subdivisions of the latter section. The seventh subdivision provides for the exemption of "all fire engines and other implements used for the extinguishment of fires, together with the buildings used exclusively for their safe keeping." The eighth subdivision, which is much relied upon as providing for the exemption of this property, is as follows: "All market houses, public squares or other public grounds, town or township houses or halls used exclusively for public purposes, or erected by taxation for public purposes, notwithstanding some parts thereof may be leased under and by virtue of section 2566 of the Revised Statutes of Ohio, and all works, machinery, pipe-lines and fixtures belonging to any town and used exclusively for conveying water to such town, or for heating or lighting the same, and any unpaid taxes assessed against any property comprised in this subdivision, with any penalty thereon, is hereby remitted." The property which may be leased under section 2566 is a public building or a part thereof, and that provision can have no application to the present case. The description of municipal property which is exempt from taxation indicates with unmistakable accuracy that the exemption is to extend to such property only as is actually employed

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in the exercise of municipal functions. If this conclusion were doubtful it would nevertheless be required by the established rule that all exemptions from taxation are to be strictly construed.

The question here presented was not decided nor considered in *Zumstein v. Coal & Mining Co.*, 54 Ohio St., 264.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

[This case was decided previous to the retirement from the bench of Judge Minshall.—Reporter.]

BROWNE, ASSIGNEE, ETC. v. WALLACE, ASSIGNEE, ETC.
ET AL.

Notice of intention to appeal—By one in fiduciary capacity—Requirements of statute—Section 6408, Rev. Stat.

To perfect an appeal under Revised Statutes, Sec. 6408, by a party in a fiduciary capacity who appeals in the interest of the trust, a separate written notice to the court of an intention to appeal is necessary. A recital in a journal entry of an intention to appeal, or that the party gives, or has given, notice of an intention to appeal, is not a compliance with the statute.

(Decided March 11, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. F. W. Browne, for plaintiff in error.

Messrs. Wilby & Wald and *Mr. Guy W. Mallon*, for defendants in error.

BY THE COURT:

As the right of appeal exists only by virtue of the statutes, in order to give the appellate court juris-

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diction the statutory provisions must be strictly followed. When the person appealing is a party in a fiduciary capacity who has given bond within the state, and who appeals in the interest of the trust, he shall be allowed the appeal without giving bond, "by giving written notice to the court of his intention to appeal within the time limited for giving bond." Revised Statutes, Sec. 6408. The statute requires a formal *written notice to the court* so that it may be filed as a paper in the case and be made a part of the complete record, showing why the court did not require a bond for appeal. This section does not provide that the notice may be entered in the first instance on the records, as in appeals from the court of common pleas to the circuit court. Revised Statutes, Sec. 5227. In this case the court of insolvency on motion confirmed a sale made by the defendant in error as assignee of the Norwood Park Company, and ordered a deed to be made to the purchaser, to all of which the plaintiff in error as assignee of the Erwin Lime Company excepted. To the journal entry confirming sale as aforesaid the following statement is appended: "And thereupon the said F. W. Browne, as such assignee of the Erwin Lime Company, gives notice of his intention to appeal this cause, and the court find that the said assignee, F. W. Browne, has given bond in this court as such assignee, and is entitled to such appeal without giving bond." This is merely a journalized statement of what took place in the court of insolvency. The entry recites that the plaintiff in error "gives notice;" but no such notice appears in the record, nor is found among the papers of the case. It does not appear that the notice given was a written notice, and it only inferentially appears that it may have been a notice to the court. This is

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not a compliance with the statute; and the judgment of the circuit court, affirming the judgment of the court of common pleas dismissing the appeal, is therefore

Affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

JOHNSON v. STATE OF OHIO.

*Prosecution for manslaughter—Deceased unintentionally killed—
Act of slayer must be prohibited by law or of culpable negligence—Criminal law.*

In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally, while the slayer was in the *commission of an unlawful act*, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish, that such act so engaged in, was a crime at common law, or one of gross and culpable negligence.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Scioto county.

The plaintiff was indicted for the crime of manslaughter in unlawfully killing one Emory Barrows on the twenty-fifth day of May in the year 1901. On the trial of the case under this indictment the defendant was convicted on the following as the conceded facts:

"That the defendant, Noah Johnson, who is a young man about twenty-three years of age and an expert bicycle rider, in the county of Scioto and state of Ohio, on the twenty-fifth day of May, 1901, as it was growing dusk in the evening, rode a bicycle, known as a racing machine, noiselessly down the main street

of a village containing about 1200 inhabitants and over one of its most prominent street crossings at a speed of about twenty miles per hour; that the evening was fair and many people were walking up and down said street and over its crossings; that defendant was leaning forward and over his bicycle, the handle bars being dropped, and was in the position commonly used in riding in bicycle races; there was no bell attached to his bicycle, no alarm was given by defendant, and he could have seen ahead of him; while riding over the aforesaid street crossing at said rate of speed, the defendant collided with Emory L. Barrows, who was at the time walking, at the usual and customary place, from one corner of said crossing over the street upon which said defendant was riding, to another corner, the force of which collision lifted said Emory L. Barrows from the ground, hurled him a distance of about fifteen feet through the air and fractured and crushed his skull in several places, thereby causing his death. The decedent and the defendant saw each other an instant before the collision and each tried to avoid it; the defendant did not intend to and did not purposely collide with the decedent and there never was any personal feeling existing between them whatever."

Exception was taken by the defendant to the following portion of the charge of the court to the jury, bearing on the legal effect of the facts stated:

"An act lawful in itself when properly performed, may be performed so improperly, that is, so recklessly and wantonly as to render it unlawful, and in such case, if the death of another result directly and proximately therefrom, it is manslaughter; the wanton recklessness or gross negligence, in such a case, supplying the place of direct criminal intent. But infer-

ences of guilt are not to be drawn from remote causes, and the law does not hold a person criminally responsible for slight negligence, nor even for a mere failure to observe or to exercise ordinary care and diligence, but only for gross negligence in the sense that I have above defined that term to you. In other words, to make it entirely plain to you: The carelessness or negligence with which an act must be done in order to render the death of another resulting therefrom, criminal homicide or manslaughter, must be gross, and such as an ordinarily reasonable and prudent person, that is, a person of ordinary discretion and judgment, might, and reasonably ought to foresee and anticipate, would endanger the lives and safety of others, and be likely to result in fatal injuries to others."

A general exception was saved to the charge. A verdict of guilty was rendered and the defendant was sentenced accordingly. He prosecuted error in the circuit court where the judgment of the common pleas was affirmed, and he prosecutes error in this court to reverse the judgments of both the lower courts.

Mr. Thomas C. Beatty, for plaintiff in error, cited the following authorities:

Sections 6811, 6812, Revised Statutes; *Weller v. State*, 10 Circ. Dec., 381; 19 C. C. R., 177; *Smith v. State*, 12 Ohio St., 466; *Winn v. State*, 10 Ohio, 345; *Mitchell v. State*, 42 Ohio St., 383; *Sutcliffe v. State*, 18 Ohio, 469.

Mr. Henry Bannon, for defendant in error, cited the following authorities:

4 Blackstone Comm., 191; 1 Hawkins' Pl. Cr., 89; *Sutcliffe v. State*, 18 Ohio, 469; Swan's Stat., 229;

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Stewart v. State, 1 Ohio St., 66; *Marts v. State*, 26 Ohio St., 162; *Erwin v. State*, 29 Ohio St., 186; 4 Blackstone Comm., 191; 2 Bishop Crim. Law, Sec. 178; 2 Bishop Crim. Law, Secs. 642, 657; 1 Bishop Crim. Law, Secs. 314, 321; 1 Wharton's Crim. Law, Secs. 305, 354, 355; 3 Greenleaf on Ev., Secs. 128, 129; Carlton on Homicide, 285, 290; 9 Am. & Eng. Ency. of Law (1 ed.), 588; *Commonwealth v. Pierce*, 138 Mass., 165; Harris' Crim. Law, 140, 142; Sec. 7217, Revised Statutes; *Wolf v. State*, 19 Ohio St., 248; *Williams v. State*, 35 Ohio St., 175.

PRICE, J. If the conceded facts are sufficient and the charge of the trial court sound law to govern the jury in deciding on such facts, the plaintiff in error may have been properly punished for very reprehensible conduct. That part of the charge contained in the statement of the case as well as a subsequent paragraph which we will notice, were equivalent to directing a verdict of conviction, inasmuch as there was no dispute as to the facts. There *was* a verdict of conviction and a sentence upon the verdict, which the circuit court sustained, and thereby must have held that the charge correctly stated the law of the case.

The importance of what is presented as an apparently new doctrine in this state, as well as respect for the opinions of both the lower courts, have been sufficient reasons for giving the questions involved a careful consideration.

The indictment for manslaughter in this case is in the short form authorized by section 7217 of the Revised Statutes, and it charges that "Noah Johnson * * * on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and one, in

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the county of Scioto, did unlawfully kill one Emory Barrows then and there being, contrary to the form of the statute," etc.

Prior to the codification of the criminal statutes, manslaughter was thus defined: "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or, unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and on conviction thereof, be punished," etc. Vol 1, S. & C., 403.

The statute on the subject now is section 6811, Revised Statutes, which reads: "Whoever unlawfully kills another, except as provided in the last three sections is guilty of manslaughter, and shall be imprisoned," etc. The preceding sections define murder in the first and second degrees. But the present section 6811 is not different in substance and meaning from the original section above quoted, and to ascertain the elements of the crime of manslaughter we look to the original as it stood before codification or revision. Therefore, to convict of manslaughter, it is incumbent upon the state to establish that the killing was done "either upon a sudden quarrel, or, unintentionally while the slayer was (is) in the commission of some *unlawful act*."

It is clear that from the facts and the instructions given the jury, that Barrows was not killed by Johnson in a quarrel; nor was the killing intentional. Hence, the latter clause of the definition of the crime is the one to which our investigation should be confined. The state was required to show that while the killing was unintentional, it was done by Johnson while he was in the commission of some *unlawful act*; and the question arises, whether the negligent

act or acts of the slayer, though no breach of any law, may be sufficient to constitute the *unlawful act* designated in the statute. Or, is the state required to show that he was in the commission of an act prohibited by law?

At the time of this homicide there was even no ordinance of the village of Scioto regulating the speed or manner of riding bicycles upon its streets. None appears in the record, and we therefore assume there was no such ordinance. And it is not claimed that there was any statute then in force on that subject. What then is the proper construction of the clause "while in commission of some unlawful act?"

The construction which prevailed in the lower courts is found again in a portion of the charge which we quote as the final admonition to the jury: "Now, gentlemen, apply these principles to the case and determine from the evidence introduced upon the trial whether the defendant, Noah Johnson, at the time he struck and killed the decedent, Emory Barrows, was riding his bicycle with gross negligence, and was it such as an ordinarily reasonable and prudent person might and reasonably ought to have foreseen would endanger the lives and safety of others, and be likely to produce fatal injuries; and was such killing the direct, natural and proximate result of such negligence? If the evidence satisfies you beyond a reasonable doubt of all these matters, then your verdict should be that the defendant is guilty of manslaughter as he stands charged in the indictment; otherwise you should acquit him."

In this language the trial court told the jury that in the defendant's conduct in the manner of riding the bicycle—its speed without signal of a bell—was, in their judgment, grossly negligent, it was an un-

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lawful act, and they might find that in such conduct he was committing an unlawful act, and, if it resulted in the death of Barrows, the rider was guilty of manslaughter. And it was left to the jury, and they were directed to determine from the evidence whether or not the acts done were grossly negligent and regardless of the life and safety of another. If so, to convict.

We have no common law crimes in this state. We think such has been the uniform understanding of the bar, and the opinion of both the judicial and legislative departments of our commonwealth. Before the trial of this case there was but one other case brought to our attention, where the proposition has been called in question. *Weller v. The State of Ohio*, 10 Circ. Dec., 381; 19 C. C. R., 166.

But this court has settled the commonly accepted rule in more than one case. In *Sutcliffe v. The State*, 18 Ohio, 469, 477, Justice Avery, speaking for the court, says: "There is no common law crime in this state, and we therefore look always to the statute to ascertain what is the offense of the prisoner, and what is to be his punishment * * *." Again on same page: "What is affirmed in this statute of manslaughter of the character which this court is intended to reach, except that the slayer must be in the commission at the time of some unlawful act?"

Also on page 477: "It is claimed for the plaintiff in error that there is no allegation in the count of the unlawful act designated in the statute. It was necessary to allege in the indictment that the person was engaged in the commission of some unlawful act. And this allegation, it appears to the court, is *distinctly* made in that part of the indictment which

charges the prisoner with an assault upon the person killed, and unlawfully discharging and shooting off at him a loaded gun. This sufficiently declares an unlawful act * * *."

As before stated, our statute now provides for a shorter form of indictment, but it does not dispense with the ingredients of manslaughter as defined in the former statute.

In *Smith v. The State*, 12 Ohio St., 466, 469, this court says: "It must be borne in mind that we have no common law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a *crime* in Ohio, unless such act or omission is specially *enjoined* or *prohibited* by the statute law of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law."

The same statement of the law was again made in *Mitchell v. The State*, 42 Ohio St., 383, and other decisions of this court.

We think the same rule abides in many, if not all the other states of the Union whose legislatures have made codes or systems of statutory crimes. It evidently is true of the federal government as settled by repeated decisions of the Supreme Court of the United States. *United States v. Worrall*, 2 U. S. (2 Dall.), 384; *United States v. Hudson and Goodwin*, 11 U. S. (7 Cranch), 32; *Pennsylvania v. Bridge Co.*, 54 U. S. (13 How.), 518, and later cases in that court. When our legislature first enacted statutes upon the subject of homicide and defining its different degrees, it did, as to manslaughter, what the state suggests, adopted almost literally the common

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law definition. *Sutcliffe v. The State*, 18 Ohio, 469, *supra*. But when this definition was borrowed and adopted by our legislature, it was adopted, not in part, but as a whole, and the act committed when the unintentional killing occurs, must be a violation of some prohibitory law. The very word "unlawful" in criminal jurisprudence, means that and nothing less. Surely the legislature did not intend to adopt part of the common law description of the offense as a statutory provision, and leave the other part to the expansiveness of the common law. Yet, that is practically the construction which the lower courts must have placed upon our statute against manslaughter. We assume that the facts show conduct grossly negligent in character. There was no malice and no quarrel between defendant and the deceased. The killing was unintentional. It was manslaughter nevertheless, if the slayer was then in *commission of some unlawful act*. The jury were told that if in their judgment, the accused was guilty of gross negligence, and a disregard for the lives and safety of others, the state was entitled to a verdict of manslaughter. In considering this rather unusual, if not new construction of the law, we must not forget a few elementary principles of the law of negligence. It (negligence) may consist of acts of omission as well as commission; and what may be mere ordinary negligence under one class of circumstances and conditions, may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or very slight care. There are other definitions, but these are sufficient now for our purpose. So we may truly say that negligence differs only in degree. With this, we cannot overlook what

experience has taught for many years, that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The inferences drawn from the same facts by different minds may often greatly differ. Hence, when we look to the case as it appeared, in the trial court, we see, that without any rule of conduct prescribed by statute to govern the case, the rule for the first time was to be established by the verdict of the jury and sentence of the court.

Up to that time the behavior of the defendant had violated no law. It was for the jury to say, under the instructions given, whether the accused had been guilty of gross negligence. If so, although the killing was unintentional and free from malice, it was manslaughter. In England, the home of the common law and where it attained its wonderful growth, and from which we have borrowed to a large extent, it became necessary and was permissible to build up, by the pen of law writers and adjudged cases a system of criminal jurisprudence, and enforce it until parliament would occupy the ground and supplant it. But that country, while so doing, was under no written constitution, and *ex post facto*, or retroactive laws might be laid down by the courts or enacted by parliament. Not so in this country where we have a written constitution prohibiting retroactive and *ex post facto* legislation. Weeks or months after the negligent acts involved in this case, we have the rule of conduct of the defendant passed upon and defined by a verdict upon the all important and indispensable element of manslaughter based on the facts of the case. It is retroactive in its effect. An act of the legislature attempting to so operate would be promptly held un-

constitutional. Can we sustain a construction of our statute against manslaughter which will have the same effect?

In our judgment the *unlawful act*, the commission of which gives color and character to the unintentional killing, is an act prohibited by law, and that such is the natural meaning of the term or clause when used in the parlance of criminal jurisprudence.

Another observation is appropriate here: The uncertainty of the common law. Some principles which are deemed common law in Ohio, are not so regarded in other states, and what some of them regard as common law, we do not recognize as such in Ohio. Therefore, the wisdom of enacting a system of penal laws at the beginning of our statehood, and of improving and expanding it as fast as conditions of society required. The growth of such legislation is itself against the holdings of the lower courts. What acts or omissions in early years were harmless, owing to the sparsity of population and character of property and business then owned and conducted, afterwards, as population increased, and business relations became diversified, became injurious to others; and in other respects the good order of society and the protection of life and property demanded and received appropriate legislation. That department of our state government has kept pace with the wrongs, the vices and immoralities of our social and industrial life. It has gone farther, when occasion demanded, and has made criminal many acts and omissions which before belonged to the field of negligence, as witness, many provisions regarding the management of railroads, factories and mines, and other branches of business where labor is employed. Many acts or omissions to act, which before were subject to

the charge of negligence, are made penal by statute. And a consideration of this course of legislation demonstrates that there is no longer a necessity to turn to the common law to find what act or acts it is unlawful to commit.

If the contention of the state in this case is tenable, it is not difficult to see how the criminal dockets in our courts will soon be flooded. The gross negligence of one, may unintentionally cause the death of many. If such negligence is the *commission of an unlawful act*, the killing of each of the slain becomes a separate crime of manslaughter. And so it would proceed, and the cases multiply according to the judgment of men, as to when the acts of others are or are not grossly negligent.

The position is untenable, and we decide that the judgments of the common pleas and circuit courts are erroneous and must be reversed, and the facts of this case being conceded, as stated herein, the plaintiff in error is discharged.

Reversed.

BURKET, DAVIS and SHAUCK, JJ., concur.

Eshelby v. Board of Education.

ESHELBY v. THE CINCINNATI BOARD OF EDUCATION.

Treasurer of school district must account for interest on deposits—Section 6841, Rev. Stat.

The treasurer of a school district who, under favor of the proviso of section 6841, Revised Statutes, deposits its funds in a bank which allows interest on the average balance of the deposit is required to account to the school district for such interest.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Hamilton county.

Plaintiff in error was treasurer of the city of Cincinnati and *ex officio* of the school district of Cincinnati. Between July 5, 1897 and July 1, 1898, he received as interest on the average balance of the school funds which he had deposited in the Atlas National Bank the sum of \$2,051.62. Whether the interest belonged to him or to the school district of Cincinnati was the subject of contention in the court of common pleas. The performance of the official duties of the treasurer was secured by a bond conditioned as follows:

"The condition of the obligation is such that, whereas the said Edwin O. Eshelby was, on the fifth day of April, 1897, duly elected to the office of treasurer of the city of Cincinnati, and, whereas, under section 4042 of the Revised Statutes of Ohio, the treasurer of the city funds is *ex officio* treasurer of the school funds.

"Now, therefore, if the said Edwin O. Eshelby shall faithfully perform all and singular his duties as said treasurer of the school funds of the school district of Cincinnati, and shall faithfully keep, disburse and account for, according to law, all moneys that shall

come, from time to time, into his hands, as such treasurer, and at the expiration of his term of office shall pay over to the proper person or authority all such moneys remaining in his hands, then this obligation shall be void and of no effect."

The court of common pleas adjudged the interest to the school district of Cincinnati, and its judgment was affirmed by the circuit court.

Mr. Frederick Hertenstein, for plaintiff in error, cited the following authorities:

State v. Harper, 6 Ohio St., 608; *United States v. Prescott*, 44 U. S. (3 How.), 578; *Beneficial Association v. Ferson*, 2 Circ. Dec., 48; 3 C. C. R., 84; *Muzzy v. Shattuck*, 1 Denio, 233; *Commonwealth v. Comly*, 3 Pa. St., 372; *Commonwealth v. Baily*, 129 Pa. St., 480; *Inhabitants v. McEachron*, 33 N. J. L., 339; *McClelland v. State*, 138 Ind., 321; *Linville v. Leininger*, 72 Ind., 491; *District Township v. Morton*, 37 Iowa, 550.

Mr. Charles J. Hunt and *Mr. Wade H. Ellis*, for defendant in error, cited the following authorities:

State v. McFetridge, 84 Wis., 523; *Commonwealth v. Godshaw*, 92 Ky., 435; *Johnson v. Fleming*, 50 S. W. Rep., 855; *Inhabitants v. McEachron*, 33 N. J. L., 339; *State v. Walsen*, 17 Colo., 170; *Wilson v. People*, 19 Colo., 199; *State v. Clarke*, 73 N. C., 255; *Supervisors v. Wandel*, 6 Lansing, 33; *Muzzy v. Shattuck*, 1 Denio, 233; *Supervisors v. Dorr*, 7 Hill, 584; *Supervisors v. Bank*, 5 Hun, 649; *Olney v. Wickes*, 18 Johns., 122; *Law's Estate*, 144 Pa. St., 499; *Davis v. Dunlevy*, 53 Pac. Rep., 250; *Burrows v. Smith*, 10 N. Y., 555; *Lonsdale v. Church*, 3 Brown Ch. Rep., 36; *Willis v. Commissioners*, 5 East. Rep., 21; *Mosby v. United States*, 133 U. S., 273; *Hughes v. People*,

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82 Ill., 78; *Spratley v. Commissioner*, 56 Kan., 272; *State v. Copeland*, 96 Tenn., 296; *Willkes-Barre v. Rockafellow*, 171 Pa. St., 177; *Village of Glenville v. Engelhart*, 10 Circ. Dec., 408; 19 C. C. R., 285; *Mast v. Matthews*, 30 Minn., 443; *Cooper v. People*, 85 Ill., 417; *Commissioners v. Van Slyck*, 52 Kan., 662; *People v. Supervisors*, 1 Hill, 362; *Matter of N. Y. C. & H. R. R.*, 7 Abb. N. C., 408.

SHAUCK, J. Counsel for the plaintiff in error has made it quite clear that the liability of the treasurer is absolute, and that it differs in that respect from that of the ordinary trustee or bailee who may be exempt from liability on account of funds lost without his negligence or connivance. But it does not necessarily follow that funds coming into the hands of the treasurer are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between him and the district. To the contrary it is quite clear that instead of being the creditor of the district he is its treasurer—the custodian of its funds—and that he acquires custody of the funds without acquiring title to them. In his bond they are designated as “the school funds of the school district of Cincinnati.” In section 4049 of the statutes they are referred to as “money belonging to the district.” The terms of section 6841 of the Revised Statutes, contain a similar suggestion as to the title of the funds. That section designates them as “public money * * * belonging * * * to the board of education,” and makes it unlawful for the treasurer “to use, loan or invest it in any manner.” While the proviso of that section makes it lawful for the treasurer of a board of education to deposit the funds in his keeping, it designates them as “public money.” These legislative designations of the owner-

ship of the funds, and these and other limitations upon their use by the treasurer, are quite irreconcilable with the theory that they become the property of the officer and he a mere creditor of the school district. Whether he should be regarded as "a bailee with express and extraordinary liabilities," or as "a special trustee," is not material, for he is, in either view, the custodian of funds which belong to another. Since the funds belong to the school district, the ultimate question in the case is answered in favor of the defendant in error by the elementary proposition, that in the absence of a statute or stipulation to the contrary the increment follows the principal. It does not aid an inquiry as to what the law is to suggest that the district would not be injured by the deposit of its funds at interest payable to the custodian since he may deposit it without interest. The suggestion does not appear to have been favorably considered by the legislature since it has indicated that while he may deposit it he may not in any manner invest it. The safety of public funds has been the chief object of care. For their security the law employs the character and ability of the treasurer, and the security which is afforded by his official bond. It has not been thought expedient to establish a policy which would give to the treasurer any personal motive in selecting a place of deposit, nor does the case suggest any reason why it should be regarded as an exception to the rule that a public officer shall receive such compensation only as is expressly provided.

Judgment affirmed.

MINSHALL, C. J., WILLIAMS, BURKET, SPEAR and DAVIS, JJ., concur.

[The above case was decided previous to the retirement of Judge Minshall.—Reporter.]

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PLATT, A TAXPAYER, ETC., v. CRAIG, DALY, JAMES,
INDIVIDUALLY, ETC., ET AL.

JONES, MAYOR OF THE CITY OF TOLEDO, v. THE STATE
OF OHIO EX REL. WALBRIDGE.

Construction of bridge over Maumee—Invalidity of act of April 14, 1900—Conflict with article 13, section 1, and article 2, section 26, of constitution—Classification of cities—Constitutional law.

1. The act of the General Assembly (94 O. L., 175), supplementing Revised Statutes, section 2835, and which provides, "That any city of the third grade of the first class may, subject to the provisions herein contained, construct, reconstruct, enlarge or repair a bridge or bridges across any navigable river or rivers, passing into or through such city," etc., is a special act applying only to the city of Toledo. Said act confers corporate powers and is in conflict with article 13, section 1, of the constitution of Ohio.
2. The said act being legislation upon a subject matter of a general nature, and being local in its operation, and it not appearing that any such local and temporary emergency exists as to justify and require special legislation, the act is in conflict with article 2, section 26, of the constitution of Ohio.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Lucas county.

Harvey P. Platt, a taxpayer, brought suit against John Craig, William S. Daly and Daniel H. James as members of the bridge commission of the city of Toledo, Samuel M. Jones as the mayor of the city of Toledo, and the city of Toledo, to obtain an injunction restraining the defendants from proceeding under an act passed by the general assembly of Ohio, April 14, 1900 (94 O. L., 175), entitled "an act to supplement section 2835 of the Revised Statutes of Ohio." On the hearing of that action in the court of common

pleas that court found for the defendants and dismissed the petition. On petition in error filed in the circuit court the judgment of the common pleas court was affirmed, and the case is now before this court to reverse the judgment of the circuit court. About the same time one Thomas H. Walbridge, as a taxpayer of the city of Toledo, brought an action in the name of the state of Ohio, upon his relation, against Samuel M. Jones, mayor of the city of Toledo. The object of this proceeding was to obtain a writ of mandamus requiring the mayor to issue a proclamation and notice to the qualified electors of the city of Toledo, notifying them in due form of law that there would be submitted to them at the election to be held on November 6, 1900, the questions as to the construction, reconstruction and enlargement or repair of bridges over and across the Maumee river in accordance with said statute. Such proceedings were had in the court of common pleas that a peremptory writ of mandamus was awarded against the mayor. On petition in error in the circuit court the judgment of the court of common pleas was affirmed. That case also is in the Supreme Court on petition in error to reverse the judgment of the circuit court.

In both of these cases the same questions were raised. Various objections were made to the validity of the above mentioned statute, but the case is disposed of upon the constitutional grounds indicated in the opinion, and therefore, it is unnecessary to state the other questions made.

Mr. W. H. A. Read, and Messrs. Doyle & Lewis, for plaintiff in error.

Mr. M. R. Brailey and Messrs. King & Tracey, for defendants in error.

DAVIS, J. These cases present two questions relating to "An act to supplement section 2835 of the Revised Statutes of Ohio," passed April 14, 1900 (94 O. L., 175). First, that the act was not constitutionally enacted. For the purposes of this case we will assume that the act was lawfully passed. Second, that this act is in conflict with article 2, section 26, and article 13, sections 1 and 6, of the constitution of Ohio. Perhaps the counsel who have raised this point deem it a self-evident proposition. At least we have not been furnished with any argument in its support, although it has been strongly combated by counsel for the city.

We will not undertake to reconcile all of the reported decisions of this court concerning those provisions of the constitution which are here involved. While as to the general principles of interpretation there is a tolerably clear consensus, a consistent thread of agreement, yet so contradictory and artificial are the conclusions resulting in specific cases, that it would be impossible to harmonize them; and it must be admitted that occasionally the court has seemed to yield to considerations of expediency rather than to firmly apply the unambiguous and explicit provisions of the constitution. Recognizing the importance of the conclusion which we have reached in these cases, we briefly restate some of the principles of constitutional interpretation on which all of the reported cases in this state seem essentially to agree.

The constitution must be construed in the light of the popular and received signification of its words. Because it emanates from the people it must be construed as the people must have understood it. The terms "general" and "special" must therefore be understood and applied in their ordinary and non-

technical sense. They are antonyms. "General" is defined in Webster's International Dictionary as follows: "4. Common to many, or the greatest number; widely spread; prevalent; extensive though not universal." The same eminent authority defines "special" thus: "2. Particular; peculiar; different from others; * * * 3. * * * Designed for a particular purpose, occasion or person. 4. Limited in range; confined to a definite field of action. * * *." It would seem to be clear, therefore, that a special act, as opposed to an act of a general nature, is one that is local and temporary in its operation (*State v. Hoffman*, 35 Ohio St., 435, 443); and while the various provisions of the constitution seem to contemplate general laws as the rule, rather than special ones, yet there is nothing in the constitution of Ohio which prohibits legislation on a subject which would be otherwise general, when such legislation is designed to meet a temporary emergency in a particular locality or in regard to a particular person, provided that such legislation does not confer corporate powers. For while it must be conceded that the tenor of the whole constitution seems to forbid special legislation under most conditions, it cannot be successfully maintained that it is absolutely prohibited under all circumstances. It would have been unwise to have left the general assembly powerless to act in unforeseen exigencies. Hence, while it is provided that all laws of a general nature shall have a uniform operation throughout the state, if it had been intended to prohibit absolutely all special legislation, it would have better expressed that intent to have said that *all* laws shall have a uniform operation throughout the state; and instead of providing that the general assembly shall pass no special act conferring corporate power,

it would have been said that the general assembly shall pass no special laws. The inclusion of the qualifying words must be presumed to have been deliberate and intentional. But the local and temporary emergency must be a real exigency, and not a mere pretext for special legislation. In all other cases the exercise of legislative power must be by general laws (in some cases it is expressly so provided), and laws of a general nature are required by the constitution (Art. 2, Sec. 26) to have a uniform operation throughout the state. Not only must such laws operate throughout the state, but they must operate uniformly, that is, there must be no exemptions as to individuals of the same class. A general law must, therefore, in its operation be co-extensive with the state and co-extensive with every class brought within the purview of the statute; but this section does not imply that a law of a general nature must necessarily affect every individual in the state, or every small subdivision of territory within the state.

The counsel who represent the mayor of the city of Toledo, plaintiff in error in the one case, and the bridge commissioners, the mayor and the city of Toledo, defendants in error in the other case, expressly concede: 1. That the act in question is one conferring corporate power, and 2. That it is a law of a general nature. This conclusion was inevitable in view of previous decisions by this court and the fact that the subject matter of the act is already the subject of general legislation. If then this act of the general assembly is a special act, it is in conflict with article 13, section 1 of the constitution, because it confessedly confers corporate powers; for, in the purview of the constitution, there is no distinction

between private and municipal corporations. *State v. Cincinnati*, 20 Ohio St., 18. If it be an act of a general nature it must operate uniformly throughout the state, exempting no individual of the class named. If it cannot by its very terms be construed as having such operation throughout the state it is in conflict with article 2, section 26 of the constitution.

The act provides as follows: "That any city of the third grade of the first class, may, subject to the provisions herein contained, construct, reconstruct, enlarge or repair a bridge or bridges, across any navigable river or rivers, passing into or through any such city," etc. It is obvious that this does not apply to all cities of the third grade of the first class, now existing or which may hereafter become such, but distinctly applies to any city of the third grade of the first class, which has a navigable river or rivers passing into or through such city. This applies to Toledo, and the court is not informed that there is one other city of the third grade of the first class in Ohio, which comes within the words of the statute or is likely ever to do so. The exercise of the powers conferred by the statute is, therefore, localized in Toledo, and it matters not whether the subject matter of the act is of a special or general nature, for inasmuch as it is special in its application to the municipal corporation of Toledo and confers corporate powers, it is unconstitutional and void.

The same conclusion must be reached if we follow up the suggestion of counsel that while this is a law the subject matter of which is of a general nature, yet that it is not in conflict with Art. 2, Sec. 26 of the constitution, "simply because it is limited to certain municipalities of the state." This law is not limited to certain municipalities, or a certain class of munic-

ipalities, but to one certain municipality. The constitution requires uniformity of operation throughout the state, upon the class named. This statute, instead of operating uniformly in all cities of the third grade of the first class, is limited to a city of that description having a navigable river passing through it. There is not so much as a hint in it of any such local or temporary emergency as would justify and require local legislation on a subject otherwise of general nature. But counsel put forward the language of the circuit court as an argument as follows: "The question remains as to whether the subject matter is appropriate to municipal control, and therefore proper to be brought under such classification of municipalities." We disclaim any intention of discussing here the much mooted doctrine of classification of municipal corporations; but answering this suggestion without denying or conceding the power of classification in general, if exercised at all it must be by general laws, and can never be done by special acts, such as the one under consideration. (Const., Art. 13, Secs. 1 and 6.)

This act attempts to create a distinct class, viz.: cities of the third grade of the first class having navigable rivers passing into or through them, an exceedingly artificial and a sham classification; and however ingenious the reasoning, it cannot be made to appear to be other than special legislation. The powers and privileges conferred, and which are conceded to be of a general nature, are conferred upon the smallest number of a particular grade of a particular class; and even if there were within the state two or three cities answering to the description, it would still be special legislation, as much so as if the act

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were limited by name, for example, to Toledo, Marietta and Portsmouth.

The judgments of the circuit court and of the court of common pleas in both cases are

Reversed.

SPEAR, SHAUCK and PRICE, JJ., concur.

BURKET, J., concurs in the judgment, and also in the syllabus and opinion, except the emergency part thereof. There is no emergency clause in the constitution, and none can be engrafted thereon by this court or the general assembly.

BONHAM v. HAMILTON.

Sale of goods by administrator—Upon terms of credit with approved security—Failure of security and resale to another—First bidder does not get title, when—And cannot maintain replevin.

1. It is a general rule that, in case of the sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done.
2. Where, at an administrator's sale of goods, upon terms of credit of nine months with approved security, a bid is accepted, but it is stipulated that the transaction is to be a sale if surety be given by ten o'clock the next day, but if not given the goods to be again offered for sale, and the sureties tendered by the bidder are not approved by the administrator, and the goods are thereupon offered and sold to another, the title to the goods does not pass to the first bidder, and he cannot maintain replevin for their possession.

(Decided March 18, 1902.)

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ERROR to the Circuit Court of Hamilton county.

The action in the court of common pleas was by the defendant in error against the plaintiff in error, in replevin, to recover possession of a stock of goods in a store room in the city of Cincinnati, on a claim that the plaintiff had purchased the goods of the defendant, as administrator, at an administrator's sale. The goods were taken under the writ and possession delivered to the plaintiff. Among other defenses the defendant, in his answer, set up the following:

"5. The defendant says that he is, and was at the commencement of this action, the administrator of the estate of Robert Wood Mercer, deceased, duly appointed by the probate court of Hamilton county, Ohio, July 8, 1896, and that in pursuance with his duties as such administrator, and by direction of such court, on the twenty-fifth day of May, 1897, he offered at public auction, as such administrator, the goods and chattels belonging to said estate remaining unsold at said date; and that at such sale the plaintiff, Jonathan Hamilton, bid the sum of \$3,550 for said stock of goods, and stated to said administrator at said time that the bid was made in pursuance of the terms of sale upon nine months' time with approved security; the defendant, as such administrator, then announced that said sale would be postponed until May 26, 1897, at 10 o'clock, for the purpose of permitting the said plaintiff, Jonathan Hamilton, to present such note to the defendant as such administrator, with security to be approved by the administrator, as required by law. Said plaintiff, Jonathan Hamilton, on the same day presented two notes to this defendant, as such administrator, with certain security or sureties, to-wit: R. W. Mercer, C. W. Mercer, William Disney and J. S. Crawford, in the total sum of \$3,550, the said

note being executed by the plaintiff, Jonathan Hamilton, to Scott Bonham, administrator of the estate of Robert W. Mercer.

"This defendant at once investigated the sureties, in accordance with an agreement with the plaintiff, and notified the plaintiff within a short time thereafter that such sureties were insufficient and were not approved by the defendant; that the notes would not be accepted by the defendant, and this defendant refused to accept said notes and also refused to deliver the property which he had offered for sale as such administrator aforesaid or any part thereof to the said plaintiff, all of which proceedings on the part of this defendant in refusing to accept such notes and to turn over such property to the plaintiff, were also duly brought to the notice of the probate court of Hamilton county, Ohio, in the presence of the plaintiff and the sureties named herein and the defendant's proceeding and refusal to accept were approved by said court. And the defendant, as such administrator and officer of said court, was directed to proceed with the sale of the said property as if no such bid had been made by the said plaintiff, which orders of the probate court this defendant, as such administrator, proceeded to comply with." And prayed judgment for the value of the goods which he averred was \$6,823.24, and damages for detention.

The new matter was denied by reply.

At the trial the defendant gave testimony, by himself and others, in support of his answer. And the plaintiff offered testimony in contradiction, but it was not denied that the goods were offered at administrator's sale, nor that the terms of sale were as stated in the answer. It was admitted that the value of the goods was correctly stated in the answer. The plaintiff

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also offered testimony respecting the financial worth of the sureties upon the notes tendered to the defendant in payment for said goods. Objection to this testimony was made by defendant which was sustained, and the testimony was not permitted to be given. The testimony of the plaintiff (Hamilton), respecting the alleged sale, and the only testimony offered by him on that subject, was as follows:

"On the twenty-fifth of May, 1897, I had some notices these goods were going to sell; were advertised to sell that day, and I got down here in the morning about eight or nine o'clock, and went down to the store; I went to the store and Mr. Bonham was there, and somewhere between nine and ten o'clock he commenced selling some goods; and after he offered them for sale he sold some small article. Near ten o'clock, or at ten o'clock, he offered the whole store for sale, and Mr. Disney bid so much, I do not recollect just what the bid was in the first place; somebody bid before Mr. Disney, and they commenced bidding up, until it was knocked off by Mr. Disney's bid at \$3,550, or fifty-two dollars, and if I understood Mr. Bonham rightly, he asked Mr. Disney who was the buyer, and Mr. Disney said Jonathan Hamilton of Maysville; and Mr. Bonham cried off the sale, saying: 'I offer all the personal property of Robert Wood Mercer, appraised at \$6,500,' and something, holding, I thought, an inventory of the goods in his hand, and said: 'There is the appraised value, what can I get?'—when he started off. 'Can I get two-thirds?' maybe he said first; and finally he got a bid and said: 'I offer all the property of Robert Wood Mercer, what can I have a bid for it?' Those bids were put in, first one and then another, and it was finally knocked off to Mr. Disney's bid. Well, then, after the sale, why Mr. Bonham

stated that this was a sale if there was security given, if there was not security given by ten o'clock the next day he would go and sell, he would offer it again for sale; and soon after that we retired and went to Mr. Disney's office, and there those notes were gotten up that same afternoon, if my recollection serves me right, in two notes, and signed by me and the two Mercer boys, Mr. Disney and, I believe, Mr. Crawford.

"Q. Was there anything done after you left Mr. Disney's office?

"A. Why, there was nothing done that afternoon that I recollect of, only, if my memory serves me right, Mr. Bonham came back there that evening or the next morning and remarked that he would not accept of the security, and said he was going to sell the store again; he was going to go to sell the goods, and I believe did go on down."

At the conclusion of the testimony, counsel for Hamilton requested the court to give the following charge to the jury, viz.:

"If the jury find that the sureties on the two promissory notes given by the plaintiff, Jonathan Hamilton, for \$2,000 and \$1,550, payable respectively in nine months after date, to Scott Bonham, as administrator of the estate of Robert Wood Mercer, were in the aggregate sufficient as security, and should, in the exercise of prudence and reasonable care on the part of said Bonham, have been accepted and approved by him, then I charge you that the delivery of said notes by plaintiff to the defendant was a compliance with the terms of the sale, and thereby the title to the goods so sold passed to the plaintiff, Hamilton."

Which the court refused to give.

Thereupon the court directed a verdict for the defendant for the sum named and nominal damages of

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one dollar, which was then rendered, and judgment was entered in favor of defendant and against the plaintiff below upon the verdict. Error was prosecuted by Hamilton to the circuit court, by which court the judgment below was reversed for "error in this, to-wit: that the court erred in instructing the jury to bring in a verdict for the defendant, in overruling the motion for a new trial on this ground, in rendering judgment on verdict in favor of defendant in error, in refusing to give the special charge set forth in the petition in error, in rejecting evidence as to value of property and in holding that the administrator had the arbitrary power to reject the sureties, and in refusing to permit the plaintiff to introduce evidence to show the financial worth of the persons who were endorsers on the notes and given as security therefor in accordance with the advertisement and the sections of the statutes of the state of Ohio relating thereto."

Mr. Bonham, defendant below, brings error.

Mr. Drausin Wulsin; Messrs. Simrall & Galvin and Mr. Scott Bonham, for plaintiff in error.

Mr. Province M. Pogue and Messrs. Pogue & Pogue, for defendant in error.

SPEAR, J. The plaintiff below contended that if he could establish by testimony at the trial that he had tendered security which was in fact good and ought to have been approved, he was entitled to maintain his action, and he offered proof tending to support that claim. But the court of common pleas refused to admit the testimony, holding that the option to approve the sufficiency of the sureties on the notes tendered by Hamilton in payment, rested with the administrator and to be determined finally by him, and the cause seems to have turned in that court upon that question

alone. With this holding the circuit court did not agree, and reversed the judgment on this ground. As we view the record a question of importance must be considered and determined before the correctness of that holding is reached in its order.

The question above referred to relates to the completion of the alleged sale. The facts are to be assumed as given by the testimony of Hamilton, taken in connection with the admitted facts of other portions of the record. It is shown without controversy, that the alleged sale was that of an administrator, and that the terms were to be nine months' credit with approved security. This was in consonance with the terms of the statute which permits a credit of nine months where the amount purchased exceeds three dollars, and requires the administrator to take notes or bonds with two or more approved sureties. This length of credit was the longest permitted by the statute, and the administrator was without authority to make more favorable terms as to sureties, and the evidence shows this to have been clearly understood by the parties. Manifestly, therefore, the sale could not, in law, be deemed complete until these terms had been satisfied. As expressed by Hamilton: "This was a sale if there was security given; if there was not security given by ten o'clock the next day he would go on; the defendant would go on and sell—would offer the property again for sale." And that was what was done. That is, the administrator, not approving of the sureties offered, refused to accept the notes and thus, whether rightfully or wrongfully we need not now inquire, refused to complete the sale. The basis of the plaintiff's claim being the ownership in and right to possession of the goods, in other words that he had acquired title to them, it was incumbent on

him to show that the title had passed to him. If it had not, he had no right to possession. Did the admitted facts warrant the conclusion as matter of law, that the title had passed?

The distinction between a bargain and sale and a conditional sale is a vital one. If by the terms of the agreement the property in the thing sold is intended to pass immediately to the buyer, the contract is a bargain and sale; but if the property in the goods was to remain for the time being in the seller and only to pass to the buyer at a future time, or on the fulfillment of certain conditions, then the contract is an executory agreement. The question of when, and under what circumstances, a transaction amounts to a complete sale, and when only to a conditional sale, has been the subject of extended discussion since the commencement of the growth of the common law, and the number of cases bearing generally upon the subject is legion. An extended search, however, fails to find a reported case which can be said to be on all fours with the one at bar. But it is believed that a principle announced in text-books, and based upon decisions of courts of high authority, is determinative of the question here presented. In Benjamin on Sales, the author, at page 270, gives three rules applicable to conditional sales, viz.: (1) Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. (2) Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring,

or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in a state in which they ought to be accepted. (3) Where the buyer is by the terms bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled even though the goods may have been actually delivered into the possession of the buyer."

Professor Mechem, in his work on Sales, volume 1, page 2, defines the distinction in this wise: "The bargaining of parties respecting a transfer of title may take a variety of forms. Thus there may be an agreement whose legal effect is the immediate transfer of the absolute or general title. This is a sale, called sometimes, for the purpose of further distinction, a present sale, an executed sale, or a bargain and sale. Or there may be an agreement whose legal effect is that the title shall not pass until a future time, either because in the case of an ascertained chattel, something remains to happen or be performed which the parties have treated as precedent, or because the particular chattel whose title is to be so transferred has not yet been ascertained. This is an agreement to sell, called, often, for the purposes of distinction, an executory sale. It does not become a sale until the precedent event has happened, or until the condition has been performed. It then becomes a sale by force of the present agreement aided or completed by the happening of that event or the performance of that condition."

A case somewhat in point is that of *McDonald v. Hewett*, 15 Johns., 349. This was an action of trover for timber. Plaintiff and A. entered into a written contract which stated that plaintiff had bought of A. certain timber to be paid for at fair market price at the measurement in the city of New York, when it was delivered and inspected; also that the amount should be endorsed on notes which plaintiff held against A., and if it exceeded the amount of the notes, the balance to be paid in cash. The defendant took the timber to New York, but refused to deliver it, and transferred it to another. The court held the transaction to be an executory agreement, which did not vest the property in the timber in the plaintiff and that he could not maintain an action in trover against a third person for its conversion. The syllabus is: "Where after a sale of goods some act remains to be done by the vendor before delivery, the property does not vest in the vendee, but continues at the risk of the vendor." In the opinion, Spencer, J., cites *Busk v. Davis*, 2 M. & S., 397, and *Shepley v. Davis*, 5 Taunt., 621, as "full to the point that if any act remains to be done by the vendor before delivery, the property does not pass," and the cases sustain the proposition.

The rule is given in *Tarling v. Baxter*, 6 B. & C., 360, by Holroyd, J., thus: "Now, in case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done." And by Bailey, J., in the same case: "The rule of law is, that where there is an immediate sale, and nothing remains to be done by the

vendor as between him and the vendee, the property in the thing sold vests in the vendee."

Upon the question of title under the head, "where the title has not passed," Professor Mechem, Sec. 1716, observes: "The simplest form, perhaps, of the seller's breach of contract is that which is presented when, while the contract remains wholly executory, he fails or refuses to proceed with its performance. Usually and naturally the goods will not have been delivered, but will still remain in the possession of the seller." And, at section 1734 the author remarks: "In the cases in which specific performance cannot be enforced, the remedy of the buyer for the seller's breach of his agreement to sell and convey must be sought at law. The buyer in the contingency now being considered—breach before the transfer of title—can obviously not recover the goods, for, by the hypothesis, the title has not vested in him."

In the present case there did remain something not only for the buyer to do before a sale should be effected, but there remained something for the vendor to do. He was, in the discharge of the duty enjoined by his trust position bound to exercise his judgment upon the security which the buyer might offer. He could not, in disregard of this duty, blindly take what might be tendered and turn over the property of the estate, and this fact was well known to both the parties. It then follows that neither could have understood that the sale could be regarded as complete until that duty had been discharged by the administrator, and the further conclusion would also follow that without a decision favorable to the buyer, the sale would not be complete and hence title would not pass. Our conclusion is that the principle announced controls the case, and

that there was no completed sale and that the title to the goods did not pass to the bidder.

We are aware that there are cases, and many of them, which hold that where all the terms are complete save payment, and where, at the proper time and in the proper way, the buyer tenders payment, the title vests in him and he has the right to recover the goods in specie. But these cases rest upon the principle that the contract is complete when the minds of the parties have met upon the terms, the unconditional promise of one being a sufficient consideration for the unconditional promise of the other, and it would seem plain that the rule will not apply where the vendor is to do something in the future, as in the present case, to complete the sale.

We are of opinion that, whether the ground of the holding of the common pleas was or not correct—and upon that we are not now required to pass—the judgment was correct, and that in reversing that judgment the circuit court erred. The latter judgment will be reversed and that of the common pleas affirmed.

Reversed.

WILLIAMS, C. J., BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

GEURINCK v. ALCOTT.

A corporation cannot be a member of a partnership—Credit due two corporations united for joint business not partnership assets—Of money in hands of third person for two such corporations—Half belongs to each corporation—Law of garnishee—Illegality of combination to regulate prices—Money belonging to such combination not tainted with illegality, when.

2. Where two corporations by agreement contribute capital to carry on a joint business in an assumed name, the net profits to be equally divided, such combination is not a partnership, and credits due thereto are not partnership assets, but belong to the two corporations.
3. Where money is held by a third person for such two corporations, and the same is garnisheed to pay the individual debt of one of them, and, the disclosures being unsatisfactory, an action is brought against such third person and the other corporation as garnishees, both answer, and both fail to claim that such other corporation has any interest in the money, and the cause is tried upon the pleadings and testimony, it is not error of law for the court to find that one-half of such money belongs to the debtor corporation, and render judgment accordingly.
4. While a combination to regulate prices and control output, may be against public policy and illegal, the money arising as the fruits of such combination, when placed in the hands of a third person for one of the members thereof, ceases to be tainted by such illegality, and becomes honest money, subject to seizure and sequestration by garnishee process, in favor of a creditor of such member.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

The plaintiff in error, also plaintiff below, brought his action in the court of common pleas against the Ellwood Gas Stove & Stamping Company, a Pennsylvania corporation located at Ellwood City in that state, hereinafter known as the Stamping Company,

for the recovery of over fifteen hundred dollars on contract, and caused an attachment and garnishee process to be issued upon proper affidavit, and the same was duly served upon said Frank L. Alcott, defendant in-error, and service made on the corporation by publication. The disclosure of Mr. Alcott not being satisfactory, the said Bernard A. Geurinck brought an action against said Alcott under Sec. 5551, Rev. Stat., and alleged in his petition that said Alcott had certain sums of money in his hands at the time the three several writs were served upon him, belonging to said defendant corporation, and prayed that full disclosure be made, and for judgment against said Alcott for whatever money might be found in his hands belonging to said defendant corporation. The Vapor Stove Manufacturers' Association of the United States, the Cleveland Co-operative Stove Company, hereinafter known as the Stove Company, W. W. Baldwin and M. B. Clark were also made defendants and duly served, but as they claimed no interest in the money held by Mr. Alcott, they were afterward dismissed out of the case by the plaintiff below.

A joint answer was filed by the defendants, and after admitting that said Alcott is a resident of Cuyahoga county, that said Stove Company is an Ohio corporation, and some other immaterial admissions, the answer is as follows:

"They deny that said Frank L. Alcott at any time had in his possession, or under his control, or anybody else had in their possession or under their control belonging to said Gas & Vapor Stove Company and the Cleveland Co-operative Stove Company jointly credited to them under the name of the Ellwood Gas &

Vapor Stove Company, and they deny every other allegation of the plaintiff's petition not herein admitted.

"Further answering the defendants say that said proceedings as set out in plaintiff's petition was an attempt to find in this state in the hands of somebody, the funds of a corporation not doing business in this state, incorporated under the laws of another state, and that all proceedings in such attempt were illegal and irregular, and of no binding force and effect, and were proceedings for which there is no authority under the laws and statutes of the state of Ohio. That said Vapor Stove Manufacturers' Association so far as it exists at all in the state of Ohio, is not a legal entity and is not authorized to transact any business and it is incapable of being sued under the provisions of the laws of the state of Ohio.

"Defendants say that whatever money is in the possession, or ever has been, of the Ellwood Gas & Vapor Stove Company, that the same was in its hands as its own, and is not the property of anybody else, and the said Ellwood Gas Stove & Stamping Company has no interest whatever therein, and having fully answered the defendants ask to go hence with their costs."

A jury was waived and the cause submitted to the court upon the issues and evidence, and the court made special findings of fact separate from its conclusions of law in substance as follows: In February, 1895, the said Stamping Company and said Stove Company, an Ohio corporation doing business at the city of Cleveland, entered into a written contract to continue to July, 1900, whereby the Stamping Company was to contribute its plant, and the Stove Company an amount of capital equal to the value of the plant, and the two companies under the assumed name of the Ellwood Gas and Vapor Stove Company,

hereinafter known as the Vapor Company, were to carry on a joint business at the plant in Ellwood, each company to have one-half the net profits.

That about the twenty-first day of September, 1895, the said Stamping Company and Stove Company, under the said name of the Vapor Company, entered into a pool with a large number of other companies to regulate prices and output, and this last named combination appointed said Alcott as its commissioner, and reports were made to him each month for one year, and he received and had in his hands, the funds of the combination, and apportioned to each member its amount each month.

That when the first writ was served, May 4, 1896, Mr. Alcott had in his hands for said Vapor Company under said combination agreement, the sum of \$1,359.75, one-half of which was the property of the said Stamping Company, and one-half the property of the Stove Company. That on June 30, 1896, when the second writ was served, he had in his hands upon the same terms, the sum of \$1,268.64, and on August 7, 1896, when the third writ was served, he had in his hands \$200.95, making a total of \$2,829.34, one-half of which, \$1,414.67, was the property of the Stamping Company, and was in the hands of Mr. Alcott for that company.

Judgment having been rendered in favor of the plaintiff below in the original action, the court rendered judgment against Mr. Alcott as garnishee for the amount so found in his hands, with interest and costs.

The circuit court reversed the judgment, and rendered final judgment in favor of Mr. Alcott upon the findings of fact. Thereupon the plaintiff below filed

his petition in error in this court, seeking to reverse the judgment of the circuit court, and for an affirmation of the common pleas.

Messrs. Preusser & Wennemann, for plaintiff in error.

The question now in this court is: Can the Ellwood Gas Stove & Stamping Company, a Pennsylvania corporation, and the Cleveland Co-operative Stove Company by contract form a new firm, which absorbs for the time from February 2, 1895, to July 1, 1900, the entire plant or the use thereof of the Ellwood Gas Stove & Stamping Company, also all its other "property of every kind and description," and to which the Cleveland Co-operative Stove Company contributes capital equal to the value of the plant, machinery, etc., the management of which new concern is in the hands of the latter company, and thus prevent an Ohio creditor from collecting a debt which the Pennsylvania corporation owes him.

As a matter of law we claim that cannot be done. If the money found due at the several times from Alcott to the Ellwood Gas & Vapor Stove Company, was due to a partnership, the case of *Myers v. Smith*, 29 Ohio St., 120, would seem to settle that the garnishee cannot be held, where the proceeding is purely *in rem* and the members of the partnership are not within the jurisdiction of the court. *Langdon v. Conklin et al.*, 10 Ohio St., 439; *Railway Co. v. Volkert*, 58 Ohio St., 362; *Ford v. Dry Dock Co.*, 50 Mich., 358.

We claim that the Cleveland Co-operative Stove Company having answered in this case, and claiming no interest in the funds in Alcott's possession, in a suit which it might bring against Alcott for having paid the fund in his hands to Geurinck, could not re-

cover against him if Alcott plead in his answer an estoppel on the part of the company, by its appearance in this case and non-claimer of any interest in the funds. *Kunneke v. Mapel*, 60 Ohio St., 1.

Corporations are endowed with such powers only as are conferred upon them by their charters, or such as are reasonably necessary to carry into execution the powers granted. The enumeration of certain powers implies the exclusion of all others. There is no authority to form a partnership conferred upon the Cleveland Co-operative Stove and Hollow Ware Foundry Company.

The formation of a partnership implies the giving of control over the affairs of the corporation to others than their legally constituted officers and board of directors. Sec. 3248, Rev. Stat.

The common law never allowed corporations to form partnerships, and in the absence of anything to the contrary, the Ellwood Gas Stove & Stamping Company is presumed not to have such power.

Again the formation of partnerships by corporations, subjects the stockholders to additional risks, which they cannot be presumed to have contemplated, and it is furthermore void as against public policy.

While the precise question has not been passed upon in our Supreme Court, it is held in *Bank v. Bank*, 36 Ohio St., 350, and *Railway Co. v. Iron Co.*, 46 Ohio St., 44, that one corporation cannot subscribe for stock in another corporation. *State v. Standard Oil Co.*, 49 Ohio St., 137, sustains the contention. In *Pearce v. Railway Co.*, 62 U. S. (21 How.), 441; *Railway Co. v. Railway Co.*, 131 U. S., 371; *Central Transport Co. v. Pullman Car Co.*, 139 U. S., 24; *Bank v. Kennedy*, 167 U. S., 362.

In the light of the above decisions it is plain that the contract between the two corporations could not be enforced by the one against the other, and if at any time either disaffirmed the contract, either may bring suit against the other to recover as on a *quantum meruit* the value of which it actually has received the benefit. *Louisiana City v. Wood*, 102 U. S., 294; *Parkersburg v. Brown*, 106 U. S., 487; *Chapman v. Douglas Co.*, 107 U. S., 348; *Salt Lake City v. Hollister*, 118 U. S., 256; *Railway Co. v. Railway Co.*, 118 U. S., 290.

So the argument that Alcott owes the funds in his hands to the Ellwood Gas & Vapor Stove Company as a partnership, falls, because the two corporations cannot form a partnership.

Suppose Alcott refused to pay to the Ellwood Gas & Vapor Stove Company the respective amounts he reported as due them as provided in the contract with the Vapor Stove Manufacturers' Association of the United States, the result would have been that the Ellwood Gas & Vapor Stove Company would have to resort to a suit and in such suit the Ellwood Gas & Vapor Stove Company could not appear as plaintiff in Ohio, in view of the decision of *Jackson v. Brick Assn.*, 53 Ohio St., 303; *Schuler v. Israel*, 120 U. S., 506; Drake on Attachment, Sec. 528, 521; Ohio Statutes, 4993 (real party in interest must bring suit).

The legal effect of service of garnishment process upon Alcott in the original attachment suit between this plaintiff in error and the Ellwood Gas Stove & Stamping Company was an assignment of all the interests said company had in the funds in Alcott's possession credited to the name of the Ellwood Gas & Vapor Stove Company. *Alsdorf v. Reed*, 45 Ohio St., 653, and Alcott is charged with the knowledge of the

assignment. The property right thus acquired by Guerinck, the plaintiff in the attachment suit and now plaintiff in error, is enforceable. It is not in the power of Alcott, after knowledge of the assignment to settle for the fund in his hands in the name of the Ellwood Gas & Vapor Stove Company, and pay over to it the full amount; for in reality it is paying the fund to the two corporations, one of which is the defendant in the attachment suit, under an assumed name; Alcott could thus defeat Geurinck's claim. It has been so held substantially in *Railway Co. v. Volkert*, 58 Ohio St., 362; *McBlair v. Gibbes*, 58 U. S. (17 How.), 232.

To the proposition that the fund in hands of Alcott arose out of an illegal contract (the pooling contract) and could therefore not be collected from him we cite: *Planters Bank v. Bank*, 83 U. S. (16 Wall.), 483; *Kinsman v. Parkhurst*, 59 U. S. (18 How.), 289; *Armstrong v. Bank*, 133 U. S., 433.

If the circuit court decision is to stand, it means that a corporation can transfer all of its property to a joint venture or partnership and its creditors are remediless; but as has been held in *Andres v. Morgan*, 62 Ohio St., 236, where a partnership was changed into a corporation and all of the firm property transferred to the corporation; held, that the debts of the partnership became the debts of the corporation and it is liable therefor. In this case the property of the corporation was transferred to the partnership or the new combination; the court of common pleas so found. *Rouse, Trustee, v. Bank*, 46 Ohio St., 493.

If such is the policy of the law in Ohio in regard to Ohio corporations, the defendant Alcott cannot shield himself by saying the Ellwood Gas Stove & Stamping Company is a Pennsylvania corporation,

for reason would tell us that a foreign corporation cannot enjoy greater privileges in Ohio than a local one.

Mr. Orestes C. Pinney, for defendant in error.

There are two reasons why this plaintiff could not garnishee on a claim against the Stamping Company any money in Alcott's hands.

First—The defendant is a foreign corporation, at Ellwood, Pennsylvania, and the credit due a foreign corporation cannot be garnisheed, the situs of the debt being in Pennsylvania and to garnishee the credit would be assuming extraterritorial jurisdiction.

Second—The Stamping Company did not have such an interest in the fund in Alcott's hands as that it would have had a right at the time when garnishment process was served, to bring a suit for any part of the fund, because:

(a) No title to the fund or to a credit producing the fund existed until the money was paid into Alcott's hands.

(b) When paid in, the title was in Alcott as trustee until an actual proportionment had been made.

(c) When the apportionment had been made the title to no part of it became in the Stamping Company, but was in the Vapor Company.

(d) The Stamping Company, against whom the plaintiff's claim existed, had no title to any part of the fund belonging to the Vapor Company until a division had been made between it and the Co-operative Stove Company.

(e) Neither the Stamping Company nor the Co-operative Stove Company had any title to or right to or interest in, any of this fund in Alcott's hands coming to the Vapor Company until all the debts of

the Vapor Company had been paid, and there was shown to have been created a net profit.

None of these events had occurred at the time when any of the processes of garnishment were served.

The first proposition seems to have been decided adversely in the case of *Owen v. Miller*, 10 Ohio St., 136; *Swearingen v. Morris*, 14 Ohio St., 424; *Root v. Davis*, 51 Ohio St., 29.

The court in this case, in applying our attachment statutes, seems to make a difference between the right to garnishment of a credit in an action against a resident of another county and one against a resident of another state. The authorities cited by this decision seem to sustain this doctrine, as do also *Cole v. Cunningham*, 133 U. S., 107; 138 Mass., 179; *Cunningham v. Butler*, 142 Mass., 47, and *Goldey v. Morning News*, 156 U. S., 518; *Bank v. McLeod*, 38 Ohio St., 174.

This court held an attachment issued in Cincinnati against property of a Kentucky corporation would not hold the property as against a proceeding in the Kentucky court against the corporation, where in the property of the corporation was being sought to satisfy creditors and trustees had been appointed to take possession of the property of the corporation. This does not decide the above question, but it shows that in principle the courts in this state cannot exercise extraterritorial jurisdiction and obtain control of the property of a foreign corporation temporarily in this state.

But it is further urged that under the facts of the case there was nothing in the hands of Alcott, the garnishee, which could be made applicable to the payment of the claim of the plaintiff in his suit in the attachment case. The facts in that regard were found

and stated by the court of common pleas, and we think the court was justified in finding the facts as found. *Ford v. Dry Dock Co.*, 50 Mich., 358; *Harris v. Miller*, 71 Ala., 32; *Roly v. Labuzan*, 21 Ala., 60; 19 Ala., 138; 30 Ala., 68; 42 Ala., 370; *Hassie v. Congregation*, 35 Cal., 378; *May v. Baker*, 15 Ill., 89.

The statute of Illinois provides for the attachment and garnishment of "lands, tenements, goods, chattels, moneys, choses in action, credits and effects." Ill. Statute, page 932, par. 7. 35 Conn., 310; 83 Ill., 55; *Smith v. Davis*, 1 Wis., 447; Drake on Attachments, Sec. 463; 31 Ala., 552; 42 Ala., 370; 75 Ala., 530; 2 Wade on Attachments, Sec. 407; *Swann v. Sommers*, 19 W. Va., 115.

BURKET, J. In the unreported case of *Merchants' National Bank v. Standard Wagon Company*, 65 Ohio St., 559, this court held, after full argument by counsel and consideration by the court, that it was not competent for two or more corporations to unite and form a partnership, and with that holding we are still content. The same question was again considered in this case, and the same conclusion reached. Of course two or more corporations, or a corporation and an individual, as was the case in *Cleveland Paper Company v. Courier Company*, 34 N. W. Rep., 556, may purchase goods for the use of both, and both be liable therefor, but the liability is not as partners, but individually, and that is as far as the above case goes. It is not within the corporate scope of business of a corporation to be a member of a partnership with all the rights and liabilities of a partner.

The combination formed by the agreement between the Stamping Company and the Stove Company, did not therefore have the legal effect of forming a part-

nership under the assumed name of the Vapor Company, and that contract does not pretend to constitute such partnership. Each corporation agrees to furnish the same amount of capital, the business to be for the mutual benefit of the two concerns. Each to be entitled to one-half of the profits of the joint business, the net profits to be determined annually in August, and such portions as may be thought advisable to be equally divided between them.

The above provisions look very much like a partnership agreement, but nothing is said in the contract about a partnership, and the parties seem to have understood that corporations could not legally enter into a partnership, and therefore they speak of it as a "joint business," "for the mutual benefit of the two concerns."

The combination entered into by the Stamping Company and Stove Company under the name of the Vapor Company, and a number of other corporations, to regulate prices and control output, may have been void as against public policy; but certain funds came into the hands of Mr. Alcott as commissioner for that combination, and was by him apportioned to the several members thereof, among others the so-called Vapor Company, which was the Stamping Company and the Stove Company, and each of which companies was entitled under their agreement to one-half of the fund so placed into his hands for both. While the money so in the hands of Mr. Alcott may have been the fruits of an illegal combination, the money itself was not tainted by the illegality, but as to creditors of the Stamping Company, was honest lawful money, subject to seizure and sequestration by garnishee process.

It was the fund so in his hands that was garnisheed, and he answered that he had no funds belonging to the Stamping Company, because that company was entitled to one-half of the net profits only, and that no one could tell what the net profits would be until the joint business should be settled up, and *Myers v. Smith*, 29 Ohio St., 120, is cited by his counsel. In that case a claim due to a partnership was attempted to be reached to pay the debts of one of the partners, and it was held that firm credits could not be applied by garnishment to the payment of the debts of one of the partners. Here there is no partnership, but a joint venture. Section 5551 provides that "judgment may be rendered in favor of the plaintiff for the amount of property and credits of every kind of the defendant in possession of the garnishee, and for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee."

In this case Mr. Alcott now claims that he had no credit in his hands belonging to the Stamping Company and owed that company nothing, all the money owed by him being to the two corporations, the Stamping Company and the Stove Company; but he and the Stove Company were both made parties defendant, and neither one claimed in the answer filed that the Stove Company had any interest in the fund either jointly with the Stamping Company, or individually in its own right. The claim was set up in the joint answer that the fund belonged to the Vapor Company; but it could not belong to that company, because it had no existence, it was a fictitious person, a myth. This left the way open for the court to determine and find on the trial, to whom the fund belonged, and whether each company was the owner of and entitled to one-

half thereof. The court found that the Stamping Company owned one-half of the fund, and that Mr. Alcott owed that half, \$1,414.67, to that company, and this court will not weigh the evidence to see whether that finding is correct or not. The circuit court seems to have regarded that finding as a conclusion of law rather than a finding of fact, and on that ground reversed the judgment, and entered final judgment in favor of Mr. Alcott upon the findings of fact.

As the pleadings stood, no interest being claimed in the fund by the Stove Company, nor by Mr. Alcott in its behalf, the court could well find as a fact that one-half of the fund belonged to the Stamping Company, and was therefore subject in law to sequestration by garnishee process against it.

The other questions argued are so fully and clearly settled by former decisions of this court, that they need no further notice here.

Upon the record so made by the pleadings and finding of facts, the circuit court erred in reversing the judgment of the common pleas.

The judgment of the circuit court will be reversed, and the common pleas affirmed.

Judgment reversed.

WILLIAMS, C. J., SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

RICHARDSON v. THE STATE EX REL. PROSECUTING ATTORNEY.

Compensation of county commissioners—For expenses in official duty—Section 897, Rev. Stat.—Allowance of invalid claims of expense by board and probate judge—Not a bar to action for recovery.

1. The expenses which are authorized to be paid a county commissioner, by the last clause of section 897, of the Revised Statutes, include only his official expenses "actually paid in the discharge of some official duty," as distinguished from those incurred for his personal comforts and necessities. He has no valid claim against the county, or its funds, beyond the per diem compensation and mileage allowed, for any of his personal expenses.
2. Expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of a like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county.
3. The allowance of such invalid claim by the board of commissioners, upon the certificate of the prosecuting attorney, and approval of the probate judge, and its payment by the treasurer, is not a bar to an action to recover the money back.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Morrow county.

In accordance with section 5207 of the Revised Statutes, an agreed case was made up and submitted to the court of common pleas of Morrow county, by the prosecuting attorney in behalf of the state, and Samuel A. Richardson, a member of the board of commissioners. The purpose of the proceeding was to have the court determine whether certain money paid to Richardson out of the county treasury as compensation for his service as such commissioner were illegally paid; and, if found to have been so, to recover judgment for

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the same. The agreed case was also intended to submit to the court questions relating to the legality of an account which had been presented by Richardson for payment, but which has not yet been paid. The items of this account are for expenses which Richardson paid, and for which he claims he should be reimbursed out of the county treasury. A statement of the nature of the various items of compensation paid, and of those demanded, will be found in the opinion. The court of common pleas held that the payments made to Richardson were illegal, and rendered judgment against him for the amount of \$358.20; and also held that the items of the account presented for payment were illegal, with the exception of one small item, and, with that exception, dismissed and disallowed his claim.

The circuit court affirmed that judgment, except as to one item of \$6.45, and Richardson has prosecuted error to this court.

Mr. J. W. Barry and *Mr. A. L. Thurman*, for plaintiff in error.

Mr. C. H. Wood, prosecuting attorney, for defendant in error.

WILLIAMS, C. J. The amount of the judgment recovered against the defendant below, as affirmed by the circuit court, was made up of the following items, which were paid him out of the county treasury: (1) the sum of \$161.50 paid for the feed of his horse when engaged in traveling on the business of the county other than attending sessions of the commissioners; and (2) the sum of \$190.25 paid for his board when engaged in like business. And the items held unlawful in the account presented by the

defendant, but not yet paid, are (1) the sum of \$80.25 paid for the feed of his horse while attending meetings of the commissioners, and \$79.10 paid for his board while attending such meetings; (2) the sum of \$579 paid for livery hire and charged for the use of his own horse and buggy for travel within his county under the direction of the commissioners, and \$12.50 paid for railroad travel in attending their sessions; and, (3) the sum of \$20.50 paid for shoeing his horse used in traveling under the directions of the commissioners and attending their meetings.

It is the claim of the plaintiff in error that, in addition to his *per diem* compensation and mileage, he is entitled to be reimbursed out of the county treasury for each of the foregoing expenditures, under the following provisions contained in section 897 of the Revised Statutes, these being the only provisions that are applicable to the county of Morrow: "Each county commissioner shall be allowed three dollars for each day that he is employed in his official duties, and five cents per mile for his necessary travel, for each regular or called session, not exceeding one session each month, or twelve in any one year, and five cents per mile when traveling within their respective counties on official business, to be paid out of the county treasury on the warrant of the county auditor;" * * * and "when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, and when necessary to travel on official business out of his county, shall be allowed in addition to his compensation and mileage as hereinbefore provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty; and each commissioner shall present an itemized statement of his account

for *per diem*, mileage, services and expenses as aforesaid, which before it is allowed by a full board shall be certified to by the prosecuting attorney of the county, and approved by the probate judge thereof."

It must be conceded that the three dollars per day allowed the commissioner is the limit of his compensation for his day's work, in whatever way it may be performed in the discharge of his official duties. He cannot lawfully claim that the county is also bound to pay his board, or other personal expenses. And, the "mileage" allowed him is intended to compensate him for expenses of his travel on official business. That is the legal meaning and import of the term. It is defined in the Century Dictionary as "payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over." The same definition substantially is found in Bouvier's and other law dictionaries. The commissioner is at liberty, under our statute, to adopt and pursue his own method and means of travel. He may, if he chooses, travel by railway when accessible, or by vehicle hired by him, or use his own conveyance. But whatever the mode adopted, he must pay all the expenses incurred, and his only source of reimbursement is the amount of the mileage allowed him. To make such expenses an additional burden on the public funds would require a plain and unequivocal provision of the statute. An intention to do so will not be inferred. We therefore find no authority in the statute for the allowance and payment out of the public funds of the county, of any of the items in the claim presented by the plaintiff in error, but not yet allowed nor paid. His principal contention is that the claim which had been paid to him, and which he has been

adjudged to pay back, is authorized by the clause of the statute which provides that each commissioner "when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, and when necessary to travel on official business out of his county, shall be allowed in addition to his compensation and mileage as hereinbefore provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty."

This clause is not entirely free from ambiguity. It is doubtful whether, in order to entitle the commissioner to the expenses for which it provides, it is indispensable that he should, when the expenses are incurred, be engaged both in traveling outside of the county, and be there engaged in the business of the county under the direction of the board. It is not deemed necessary to pass upon that question, for it appears to be admitted in the agreed case that the judgment recovered against the plaintiff in error was for expenses charged by him while acting under the direction of the board within his own county. And, however that question may be resolved, the expenses authorized to be paid a commissioner under the provision of the statute in question, are, we think, official expenses only, as distinguished from those which pertain to his personal comforts and necessities. The statute contemplates that emergencies may arise when it will become reasonable and necessary to pay out money in the performance of some official duty by the commissioner, in order to properly protect the interests of the county, without awaiting a meeting of the board; and the purpose of the provision was to reimburse him when, in the language of the statute, the money had been "actually paid in the discharge

of his official duty." For his personal expenses of any kind he can claim nothing beyond his *per diem* and mileage. It is a fair inference that if it had been intended to reimburse the commissioner for expenditures of this character, the legislature would have expressed that intention in plain terms. It is well settled that the compensation of public officers cannot be enlarged, by implication, beyond the terms of the statute. *Debolt v. Trustees*, 7 Ohio St., 237; *Clark v. Commissioners*, 58 Ohio St., 107.

It is further contended in behalf of the plaintiff in error, that the allowance of his claim by the board of commissioners, upon the certificate of the prosecuting attorney and approval of the probate judge, is equivalent to a judgment of a competent court upon the legality and merits of the claim, and, no appeal having been taken therefrom, is a bar to an action to recover the money back. Such an allowance, when no illegality appears on the face of the claim, may be sufficient to justify the treasurer in its payment, unless it is paid with knowledge of its infirmity otherwise obtained, but it cannot operate to protect the person who unlawfully received the money, nor to deprive the county of its right to recover back the money when it has been unlawfully obtained from the treasury. *Jones v. Commissioners*, 57 Ohio St., 189; *Higgins v. Commissioners*, 62 Ohio St., 621.

Judgment Affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

JONES, ADMINISTRATOR, v. WILLIS, ADMINISTRATOR.

Personal representative of an executor—Not liable to administrator de bonis non, when—Section 6020, Rev. Stat.—Interpretation of statute.

The personal representative of an executor who *died* in office, before an account was due or filed in reference to the trust, is not liable, under section 6020, Revised Statutes, to the administrator *de bonis non* of the testator in an action brought against him alone as such personal representative, to recover for unadministered assets of the estate of such testator, where none of such assets came into the possession or under the control of such personal representative.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Fayette county.

[This case was heard and decided by the Northern Division of the court.]

The plaintiff in error, in the year 1895, by the probate court of Fayette county was appointed administrator *de bonis non* with the will annexed, of James M. Willis, deceased and qualified as such. The predecessor in the trust was William R. Willis, who was appointed as executor of the will without bond, in September, 1888. At the time of this appointment and acceptance of the trust, the executor, it is alleged in the petition filed in the common pleas court, was indebted to his father, the testator, in a large sum, which matured at different dates and in different sums between March, 1881, and the death of the testator, which sums with interest aggregate the sum of \$19,182.81, for which the petition prayed judgment with interest from January 1, 1894.

The plaintiff in error was plaintiff in that petition, and the defendant in error was made defendant. In

January, 1890, and before any account with the trust was due or filed, William R. Willis, the executor, died. On the — day of October, 1892, the defendant, J. Madison Willis, was appointed and qualified as administrator of the estate of said William R. Willis, and in the same month and year he filed a statement or account in the probate court as to the doings and acts of said William R. Willis while he was executor of said will of James M. Willis, deceased, the testator.

In this account or statement no reference was made to any of the alleged indebtedness of said William R. Willis to his testator at the time he accepted his appointment, and it was silent on that subject, but contained in substance a statement that no part of the estate of the testator had come into his possession as administrator of the estate of William R. Willis, and that there was nothing about which any account could be rendered by him as such personal representative of William R. Willis, formerly executor.

Exceptions were filed to this statement or showing, by one or more of the legatees under the will of the testator, James M. Willis, on the ground that the administrator of the estate of William R. Willis, the defendant in error, who had been executor, did not charge himself with the debts which his intestate owed the estate at the time of his appointment. The probate court sustained the exceptions to the extent of the amount for which suit was brought in the court of common pleas, and charged the same against defendant in error, and the findings of the probate court in this respect are fully set out in the petition, as the basis of the action against the defendant in error.

The defendant demurred to the petition and the demurrer was overruled. The defendant filed an answer containing several defenses, which were after-

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wards amended and supplemented. To the several defenses the plaintiff in error, plaintiff below, filed demurrers, which were sustained by the court, and no further amendments being desired, the court found for the plaintiff. Exceptions were taken to the ruling of the court on the demurrer to the petition and also on the demurrers to the answer, and error was prosecuted in the circuit court and it was adjudged by that court, that the common pleas erred in overruling the demurrer to the petition; and erred in sustaining the demurrers to the defenses contained in the answer. Error is prosecuted in this court to reverse the judgment of the circuit court.

Mr. Humphrey Jones, for plaintiff in error.

Messrs. Harper & Harper, for defendant in error.

BY THE COURT

We do not doubt that when one who is appointed executor of the will, or administrator of the estate of a deceased person, and accepts the trust, being at the time indebted to the estate, such indebtedness at once becomes assets in his possession, and are treated as so much money received. This has been repeatedly held by this court and is not in controversy in this case.

The plaintiff in error commenced his action in the lower court, relying on the provisions of section 6020, Revised Statutes, which reads:

“An administrator or executor appointed in the place of an administrator or executor who has resigned, been removed, or whose letters have been revoked or authority extinguished, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit

against the former executor or administrator, and his sureties on administration bond, for the same, and for all damages arising from the maladministration or omission of the former executor or administrator."

In this case the facts show that William R. Willis, executor of the will of James M. Willis, died while in office and before any settlement account was due or filed. The will appointing him, as executor, directed that no bond be given and none was given. When we undertake to apply section 6020 to the facts plead in the petition, it appears to us quite clear, that it does not support the plaintiff's claim and right of action.

The defendant, James Madison Willis, is the personal representative of William R. Willis, the executor who died.

Section 6020 confers upon the successor of an executor or administrator, "who has resigned, been removed, or whose letters have been revoked, or authority extinguished, a right to the "possession of all the personal effects and assets of the estate unadministered," and also confers upon such successor the right to bring and maintain a suit against the "former executor, or administrator and his sureties on administration bond, for the same," etc. But this action is not against the former executor or administrator and his sureties on a bond; but is brought against the personal representative of such executor, who never had custody or possession of the assets in question.

We are of opinion that section 6020 does not cover the plaintiff's case and does not authorize the present action. We believe that according to the wording of this section the cases of *Tracy v. Card*, 2 Ohio St., 431, and *Curtis v. Lynch*, 19 Ohio St., 392, still have con-

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trolling effect on the facts in this case. The petition failed to show a right to recover in the plaintiff. The demurrer to the petition was well taken and should have been sustained by the common pleas.

The judgment of the circuit court is affirmed.

Affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

THE PENNSYLVANIA COMPANY v. MCCURDY.

Employee held to appreciate dangers from defects—Of which he might have knowledge—Law of master and servant.

An employe experienced in the service in which he is engaged is conclusively held to appreciate the dangers which may arise from defects of which he has, or in the exercise of due care might have, knowledge.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. J. R. Carey and Mr. F. J. Mullins, for plaintiff in error, cited the following authorities:

Peterson v. Ga. R. & Bkg. Co., 97 Ga., 798; *Jones v. Kern*, 101 Ga., 309; *Coal Co. v. Barber*, 47 Kan., 29; *Aultman, Taylor & Co. v. Syme*, 91 Hun, 632; *Phelan v. Douglas*, 11 How. Prac., 193; *Taylor v. Brown*, 147 U. S., 640; *Coal & Car Co. v. Norman*, 49 Ohio St., 598; *Coal Co. v. Estievenard*, 53 Ohio St., 43; *Hesse, Admx., v. Railroad Co.*, 58 Ohio St., 167; *Griffith v. Gidlow*, 3 H. & N., 648; *Hough v. Railroad Co.*, 100 U. S., 224; *Reese v. Clark*, 146 Pa. St., 465; *Marean v. Railroad Co.*, 167 Pa. St., 220; *Marsh v. Chickering*, 101 N. Y., 396; *Dillon v. Railroad Co.*, 3 Dill., 319; *Smith v. Sibley Mfg. Co.*, 85 Ga., 333; *Rail-*

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road Co. v. Ray, 70 Ga., 674; *Nelson v. Railroad Co.*, 88 Ga., 225; *McGhee v. Bell*, 19 Ky. L. R., 267; *Lawrence v. Hagemyer & Co.*, 93 Ky., 591; *Michael v. Stanley*, 75 Md., 464; *Erdmann v. Illinois Steel Co.*, 95 Wis., 6; *Railroad Co. v. Jones*, 11 Ill. App., 324; *Railroad Co. v. Thompson*, 15 Ill. App., 117; *Railroad Co. v. Montgomery*, 15 Ill. App., 205; *Railroad Co. v. Puckett*, 52 Ill. App., 223; *Railroad Co. v. Swisher*, 53 Ill. App., 411; *McQueen v. Railroad Co.*, 30 Kan., 689; *Goltz v. Railroad Co.*, 76 Wis., 136; *Anderson v. Lumber Co.*, 67 Minn., 79; *King v. Lumber Co.*, 93 Mich., 172; *Schroeder v. Car Co.*, 56 Mich., 132; *Peterson v. Lumber Co.*, 90 Wis., 83; *Railroad Co. v. Bradford*, 66 Tex., 732; *Railroad Co. v. Kemper*, 147 Ind., 561; *Feeley v. Pearson Cordage Co.*, 161 Mass., 426; *Foley v. Elec. Light Co.*, 54 N. J. L., 411; *Conley v. Am. Ex. Co.*, 87 Me., 352; *Ames v. Railroad Co.*, 135 Ind., 363.

Messrs. Webber & Turner, for defendant in error, cited the following authorities:

Coal & Car Co. v. Norman, 49 Ohio St., 599; *Hesse, Adm., v. Railroad Co.*, 58 Ohio St., 167; *Gas & Gasoline Engine Co. v. Schelies*, 61 Ohio St., 312; *Railway Company v. Erick*, 51 Ohio St., 146; *Jones v. Pipe Company*, 15 C. C. R. 26; *Stewart v. Bridge Co.*, Ib., 601; *Railroad Company v. Waterworth*, 21 C. C. R., 495; *Railroad Company v. Hilliard*, 116 U. S., 642; *Fulton v. Bullard*, 94 Fed., 781; *Bailey on Master and Servant*, 184; *Beach on Contributory Negligence* (3 ed.), Sec. 37; *Black's Law & Practice in Accident Cases*, Sec. 325; *Goodrich v. Railroad Co.*, 116 N. Y., 398; *Davidson v. Cornell et al.*, 132 N. Y., 228; *Baird v. Railroad Co.*, 61 Ia., 359; *Russell v. Railroad Co.*, 32 Minn., 233; *Cook v. Railway Co.*, 34 Minn., 45; *Dorsey v. Construc-*

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tion Co., 42 Wis., 584; *Lawless v. Railroad Co.*, 136 Mass., 1; *Ferren v. Railroad Co.*, 143 Mass., 197; *Fitzgerald v. Paper Company*, 155 Mass., 155.

BY THE COURT:

McCurdy brought suit in the court of common pleas to recover for a personal injury received while coupling cars. He was employed by the company in the capacity of yard conductor at Canton. The negligence alleged against the company was that it furnished a car with a Dowling coupler which at the time was defective in that the knuckle had been broken off. Upon the trial of the case on the usual issues plaintiff's testimony showed that he had been in the employ of the company for more than fifteen years during several years of which time he was employed as yard conductor. Testimony was also introduced to show that the defect in the car was open, visible to him and observable by him at the time he sustained his injury, and furthermore that an inspector of cars had previously called his attention to the particular defect. Upon this state of the evidence the court gave to the jury, among others, the following instruction:

"Employees are presumed to be aware of and take notice of all risks and dangers which are open to observation; and they must exercise their senses, and use reasonable care under the circumstances, in examining their surroundings; and if, in the exercise of such care, the plaintiff knew or could have known of the conditions and circumstances under which the work was being done, and the dangers incident thereto, and appreciated them, he must be held to have assumed the risk."

The substance of the condition that plaintiff must appreciate the danger before being bound by its con-

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sequence, was several times repeated in the charge. For this limitation upon his duty, in view of the fact that he was experienced in the service in which he was employed, there is no authority nor reason whatever. A servant is bound to appreciate dangers which may result from defects of which he has, or in the exercise of due care might have, knowledge, and a failure to appreciate danger arising from such sources is no excuse. *Coal & Car Co. v. Norman*, 49 Ohio St., 598; *Coal Co. v. Estievenard*, 53 Ohio St., 43; *Hesse, Admr., v. Columbus, Shawnee & Hocking Railroad Co.*, 58 Ohio St., 167.

Judgment reversed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

BOOCO v. MANSFIELD.

Action on promissory note—Denial of execution—Not inconsistent with claim of nonconsideration—Pleadings.

1. In an action on a promissory note, a denial of its execution and delivery is consistent with a separate ground of defense, that the note is without consideration.
2. When both defenses are made, and the plea of want of consideration is in general terms, it is error for the court to require the defendant to make the same definite and certain "by setting forth the facts and circumstances connected with the note which render it without consideration," and the error is continued in striking the defense from the answer for noncompliance with such order. The case of *Chamberlain v. Railway Co.*, 15 Ohio St., 225, distinguished.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Fayette county.

The defendant in error, Minnie Mansfield, sued in the court of common pleas to recover of plaintiff in error, on a promissory note which reads as follows:

"April 11, 1894, Jeffersonville, Ohio.

"One day after date I promise to pay to Minnie Mansfield, five hundred dollars.

"ISAAC S. BOOCO."

The petition on the note is in the usual short form, and prayed judgment for the amount of the note and six per centum interest from its date.

The defendant, Booco, answered the petition, setting up two grounds of defense, which are:

"First defense—That said defendant did not make and deliver the promissory note in the petition described, and that the defendant denies each and every allegation contained therein.

"Second defense—The said defendant for a second defense to the said petition says: that there is not now, nor was there at any time any consideration whatever for the said pretended note set out and described in the said plaintiff's petition, and the said defendant therefore avers that the said pretended note is wholly without any consideration therefor, and that the same is void."

The plaintiff below filed her motion for an order of the court requiring the defendant to make the first and second defenses more definite and certain, which motion the court overruled as to the first defense, but as to the second defense sustained said motion, and required the defendant to set forth the facts and circumstances connected with said note which rendered it without consideration and void as claimed by him. The defendant excepted to this order of the court, and the defendant not desiring leave to amend said second defense and not amending the same as ordered, the court struck it from the answer, and to this order the defendant excepted.

The case went to trial by jury on the first defense, and the plaintiff obtained a verdict for the amount demanded in the petition, for which the court rendered judgment, and overruled the motion of defendant for a new trial. The defendant prosecuted error in the circuit court where the judgment of the common pleas court was affirmed. The case comes to this court on error, but the principal error relied on for reversal is the order of the trial court requiring the second defense to be made certain and definite as stated in the order, and striking the defense from the answer for noncompliance therewith.

Messrs. Gregg, Patton & Gregg, for plaintiff in error.

The defendant has the right to put in issue all the elements that go to make a valid instrument, to-wit: the execution, delivery and consideration.

The execution and delivery being denied, the question of consideration becomes important to prove or disprove the execution and delivery and to take this question from the case therefore bar the introduction of testimony thereon, affected a substantial right of the defendant.

The court in passing on a question of this character should take into consideration the facts as pleaded, and determine it in the light of the particular facts in the case, and should consider the allegations of the first defense.

The defense relied on being forgery there could be no facts or circumstances within the defendant's knowledge to enable him to comply with the order of the court. All he could do would be to allege it in general terms as was done in this case. There-

fore, it would be impossible to comply with the order of the court.

The form of answer adopted in this case was taken from the case of *Pavey v. Pavey*, 30 Ohio St., 600, where it was held good.

In the cases of *Pavey v. Pavey*, 30 Ohio St., 600, and *Clark v. Clark*, 8 Circ. Dec., 752; 16 C. C. R., 103, the execution and delivery of the note in question was admitted by the defendant. And the execution and delivery being admitted, there must be facts within the defendant's knowledge that show a failure or want of consideration, if there is in fact a want or failure of consideration.

The pleading in question did not come within the provisions of Sec. 5088, Rev. Stat. The precise nature of the defense was pleaded, to-wit: "No consideration." The plaintiff was apprised of the character of the defense.

Between the original parties to a promissory note, the facts are as much within the knowledge of the payee as the maker; and such payee could not be taken by surprise. 6 Ency. Pl. & Pr., 274.

A ruling of a court ought never to be upheld where it will result in injustice and hardship on a party to a suit when a contrary ruling could not prejudice the opposite party. It is contrary to the letter and the spirit of our system of jurisprudence.

The distinction between pleading want and failure of consideration that we have insisted on in this case has been recognized by the courts of many of the states. 4 Ency. Pl. & Pr., 947; *Kernodle v. Hunt*, 4 Blackf., 57; *Webster v. Parker*, 7 Ind., 185; *Billan v. Hercklebrath*, 23 Ind., 71; *Wheelock v. Barney*, 27 Ind., 462; *Beaver v. Hartville University*, 34 Ind.,

245; *Mookler v. Lewis*, 40 Ind., 1; 3 Ala., 316; 5 Ala., 346; 7 Ala., 129; *Milligan v. Pollard*, 112 Ala., 465; 6 Ark., 412; 10 Ark., 273; 11 Ark., 307; 5 Ark., 345; 8 Ark., 133; 34 Ark., 169; *Gulf, C. & S. F. Ry. v. Harriet*, 15 S. W. Rep., 556; *Patterson v. Gile*, 1 Colo., 200; *Munro v. King*, 3 Colo., 238; 64 Ill., 366; 97 Ill., 642; *Couchman v. Thomas*, 3 Ky., 261; *Commonwealth v. Clark*, 4 Ky., 531; 9 Miss., 489; 42 Miss., 276; *Miller v. Brumbaugh*, 7 Kan., 343; *Brown v. Ready*, 20 S. W. Rep., 1036; *Foren v. Dealey*, 4 Ore., 92; 4 Ency. Pl. & Pr., 950.

The court erred in ordering the second defense stricken from the defendant's answer. Sections 5087, 5071 and 5082, Rev. Stat.

It is only redundant, irrelevant or scurrilous matter that the court has power to order stricken from a pleading and there can be no claim made that this pleading was of that character. And the fact the court had sustained a motion to make more definite and certain cannot change the rule. *Long v. Newhouse*, 57 Ohio St., 348.

The Supreme Court has also held that the adoption of our code has broadened the practice pertaining to the administration of justice as it existed before the code. *Peter v. Foundry & Mach. Co.*, 53 Ohio St., 534.

The court also erred in admitting the note in evidence and overruling the demurrer of defendant to plaintiff's evidence.

There was no evidence whatever offered to prove the defendant Booco ever executed the note in question.

Before the note would be competent evidence there must be proof offered of the execution and delivery.

The execution being proved, the possession of the payee of the note might be sufficient evidence of the delivery; but there being no proof that Booco signed the note or authorized any one else to sign it, he could only be liable by having adopted the instrument as his under circumstances that would create an estoppel from denying the adoption.

In the hands of a *bona fide* holder for value, the adoption of the note would be binding, but as between the original parties, where no one is misled, the authorities are divided as to the effect of the adoption of a forged signature, some holding the purported maker liable; others, the contrary rule. Tiedeman Com. Paper, 399; 2 Daniel Neg. Instruments, 360.

And the weight of authority and the reason is with the latter rule.

The note sued on was non-negotiable and did not contain the words "value received" or any words of similar purport. It would not come within the rule of instruments that import a consideration and a good or valuable consideration must be proved.

The courts hold that the words "value received" over the signature of the maker is an acknowledgment of a consideration, and *prima facie* evidence, which is sufficient to put the burden on the defendant to show there was no consideration. But no such rule applies where these words are omitted and the note is non-negotiable. 14 Ency. Pl. & Pr., 482; 2 Greenleaf Ev., 152; Tiedeman Com. Paper, 152; *Burnham v. Allen*, 1 Gray, 496; 51 Me., 191; *Hemmenway v. Hickes*, 4 Pick. (Mass.), 497; *Prindle v. Caruthers*, 15 N. Y., 425; *Walrad v. Petrie*, 4 Wend. (N. Y.), 575; *Spear v. Downing*, 22 How. Pr. (Su-

preme Ct. N. Y.), 30; *Spear v. Downing*, 34 Barb. (N. Y.), 522; *DeForest v. Frary*, 6 Cow. (N. Y.), 151; *Lansing v. McKillip*, 3 Cai. Rep. (N. Y.), 286; *Shee v. Megargee*, 4 Phila. (Pa.), 75; 17 Leg. Int. (Pa.), 20; 2 McCord L. (S. Car.), 218; 3 McCord L. (S. Car.), 195; *Brown v. Parks*, 8 Humphrey (Tenn.), 294; *Read v. Wheeler*, 2 Yerg. (Tenn.), 50; *Shelton v. Bruce*, 9 Yerg. (Tenn.), 24; *Summers v. Sanders*, 28 S. W. Rep., 1038; 1 Parson's Notes and Bills, 226; *Torrey v. Baker*, 1 Allen, 121; 2 Leigh, 198; 15 Gratt., 165; *Bristol v. Warner*, 19 Conn., 7; *Betts v. Gas & Water Co.*, 97 Pa. St., 367; 64 Vt., 601; *Edgerton v. Edgerton*, 8 Conn., 6; *Birclebach v. Wilkins*, 22 Pa. St., 26.

The case in *Spear v. Downing*, 22 Howard Pr. (N. Y.), 30, which was affirmed, 34 Barb. (N. Y.), 522, was decided under a similar statute to Sec. 5086 under our code.

The rules adopted by the law merchant that promissory notes and bills of exchange are the representatives of and intended to take the place of, and circulate as money, can have no application to an instrument such as the one sued on, and the holding that such instruments import a consideration therefore fails.

The mere fact of the delivery of what purported to be a promissory note would not bind the promisor, unless there was some consideration for the promise. A gift of one's own note is a delivery of a promise only and not the thing promised. *Hamor v. Moore*, 8 Ohio St., 239; *Starr v. Starr*, 9 Ohio St., 74; *Swan's Treatise*, 518.

The allegations of the first defense in the answer consisted of new matter within the meaning of Sec.

5079, Rev. Stat. *Hauser v. Metzger*, 1 C. S. C., 164; *Bank v. Lloyd*, 18 Ohio St., 355.

Not being denied by reply, the facts therein alleged stood admitted by section 5081. *Fewster v. Goddard*, 25 Ohio St., 276.

Under the pleadings the defendant was entitled to judgment and the demurrer to the evidence was equivalent to a motion for judgment, and the action of the court in admitting the note in evidence against defendant's objection and in overruling the demurrer was clearly error.

Messrs. Van Demin & Chaffin, for defendant in error.

Brief of *Mr. Frank A. Chaffin*.

Complaint is made by plaintiff in error that the court erred in ruling that he should make his answer more definite and certain, and on his refusal to do so, it was error "to strike it from the files."

This we think is the only question in the case that might be open to argument, and this, we claim, has been settled by the court in the case of *Chamberlain v. Railway Co.*, 15 Ohio St., 225, and followed by the circuit court in *Clark v. Clark*, 8 Circ. Dec., 752; 16 C. C. R., 103.

The court will observe that the defendant, in his answer, undertook to plead two separate and distinct defenses.

The first entirely different from the second. The second in no way containing any part of the first, either by incorporating its language, or by reference, as was done in *Hammond v. Earle*, 58 How. Pr., 426, 1 Kinkead Code, Pl. & Pr., Secs. 78 and 20. Consequently both must be complete in and of themselves. Kinkead P. & P., p. 84; *Reid v. Huston*, 55 Ind., 173; *Bank v. Green*, 33 Ia., 140. It is but begging the

question to say that the allegations in the first defense aids the second.

We submit that the first defense does not plead forgery—even if defendant had incorporated its allegation in his second defense. We admit it bears the ear-marks of having been drawn to suit the occasion—and reads “that said defendant did not make *and* deliver the promissory note,” etc.

He might not have *made* it, and yet *delivered* it. He might not have *delivered* it and yet *made* it. In either event it would not be forgery, and if there was any error in this case, we think it was committed when the court overruled the motion of plaintiff to said first defense.

Had defendant denied “that he made *or* delivered,” or had he stated in his answer “that he neither made, *nor* delivered said note,” then his first defense would have been well pleaded, and in accordance with the case of *Winchell v. Crider*, 29 Ohio St., 480; *Kinthead Form*, 337.

Another claim is made, viz.: “That the court has no power to strike out of the pleading, any matter except such as is specified in Ohio Rev. Stat., Sec. 5087.”

If this is true, then not only the lower courts, but the Supreme Courts as well, have been erring for years. *Commissioners v. Hoaglin*, 5 Kan., 558.

To the answer to argument of the plaintiff in error that “the allegations of the first defense consisted of new matter and there being no reply filed, the facts, under the code, therein stated, stand admitted.” We say there was no necessity for a reply. But for sake of argument, admit the answer set up new matter requiring one. The defendant did not complain in the lower court; did not ask for judgment on the

pleadings, but proceeded to try the case, and after the jury decided that he should pay, and the case had reached the circuit court, he then complained because no reply had been filed. If defendant had actually pleaded new matter, and plaintiff refused to reply, he might have demanded judgment on the pleadings, and then if the court had refused that judgment and forced him to trial, there might have been some ground for dissatisfaction. But such is not the case here, and under the circumstances, it looks as though he was simply "laying up for the second heat," not knowing that Judge Okey, as far back as 1883, had "dropped the flag" on such proceedings and made it a matter of record in the case of *Lovell v. Wentworth*, 39 Ohio St., 614.

And in so doing only followed *Woodward v. Sloan*, 27 Ohio St., 592; *Randall v. Turner*, 17 Ohio St., 262; *Fretz v. Stover*, 89 U. S. (22 Wall.), 198; *Clements v. Moore*, 73 U. S. (6 Wall.), 299; *White v. Richmond*, 16 Ohio, 5.

But we claim no reply was necessary. The question made, because the note was non-negotiable, has been settled by *Dugan v. Campbell*, 1 Ohio, 115; *Ring v. Foster*, 6 Ohio, 279, and *Howe v. Hartness*, 11 Ohio St., 449; *Leonard v. Sweetzer*, 16 Ohio, 1.

On the question of consideration, we are compelled to hold different views from those expressed by counsel for Booco, and insist there is quite a difference between a promissory note and a book account.

The former is signed by the debtor, and thereby acknowledged, and a written promise to pay it. The latter is made up entirely by the creditor, and is only his memoranda against the debtor.

It can make no difference, whether this note was negotiable or not, whether it contained the words "value received" or not, the defense relied on was forgery. It was a *promissory* note, even though not negotiable, nor containing the words "value received," and the case of *Dalrymple v. Wyker*, 60 Ohio St., 108, can be of no benefit to their side of the contention. In fact it decides that "consideration" is presumed in promissory notes.

Was this a promissory note?

It is useless to cite authorities. There is none but holds that all that is required is "a written promise to pay, to a person named, a certain sum of money, absolutely at a time therein named." 2 Blackstone, 467; 3 Kent, 74; Chitty, 585; 1 Daniel, 36; Story, Sec. 1; Bouvier Law Dic.

Some authorities go so far as to say, that the time of payment need not be definitely fixed. Randolph, Secs. 7, 178; Byles, 87; Chitty, 79-184; 1 Daniel, 117; 1 Parsons, 193; Story, Sec. 63; Story on Prom. Notes, Sec. 51. And dozens of other cases and authorities cited under Sec. 178.

All commercial paper implies a consideration, though none be expressed by these or other words. Randolph, Secs. 178-180; 1 Edwards, Sec. 202; Story on Bills, Sec. 63; *Mandeville v. Welsh*, 18 U. S. (5 Wheat.), 277, and a long line of cases cited under note 3 to Sec. 178, Randolph, and note 1 to Sec. 180.

The rule in question is very tersely expressed in 1 Parsons on Contracts, 249: Usually bills and notes express the consideration by saying, "for value received;" but when this is not expressed, it is implied by law, both as to the *makers* and *acceptors*, and this presumption must be rebutted by evidence, if the de-

fense rests on want of consideration. Citing *Hatch v. Traves*, 11 A. & E., 702; *Grant v. De Costa*, 3 M. & S., 35; *Benjamin v. Tillman*, 2 McLean, 213; *Briston v. Warner*, 19 Conn., 7; *Popewell v. Wilson*, 1 Stra., 264; *Lines v. Smith*, 4 Fla., 47; *Clark v. Shneider*, 17 Mo., 295; *Austin v. Blue*, 6 Mo., 265.

Negotiability is no necessary part of the form or substance of a promissory note. *Barchell v. Slooch*, 2 Ld. Raym., 1545; *Smith v. Kendall*, 6 T. R., 123; *Kimball v. Huntington*, 10 Wend., 675; *Middlesex v. Davis*, 3 Metc., 133; *Arnold v. Sprague*, 34 Vt., 402; *Bigelow Bills and Notes* (2 ed.), 22 and 23; *Lines v. Smith*, 4 Fla., 47; *Hubble v. Fogartie*, 3 Rich. (S. C.), 413; *Hunley v. Long*, 5 Port. (Ala.), 154; *Thompson v. Armstrong*, 5 Ala., 383; *Cook v. Gray*, Hempst., 84; *Ware v. Kelley*, 22 Ark., 441; *Townsend v. Derby*, 3 Metc., 363; *Kinsman v. Birdsall*, 2 E. D. Smith, 395; *McArthur v. McLean*, 6 Jones, 475; *Labadie v. Chateau*, 37 Mo., 413; 2 Am. & Eng. Ency. Law (1 ed.), 339, subject Bills and Notes; *Delano v. Bartlett*, 6 Cush., 364; *Hill v. Todd*, 29 Ill., 101; *Sawyer v. Vaughn*, 25 Me., 337.

PRICE, J. The first defense contained in the answer, when stripped of unnecessary verbiage, is a denial of the execution and delivery of the note—the subject of the action. And the second defense pleads generally, that the alleged instrument is without any consideration to support it. This being its character the plaintiff below, by motion, asked the court to require the defendant to make this ground of his defense definite and certain “by setting forth the facts and circumstances connected with said note which render it without consideration and void,” and “by

setting forth a complete statement of facts upon which said second defense is based."

This motion was sustained and thereby the defendant was required to so reform and amend the plea, as to set out "the facts and circumstances connected with said *note* which render it without consideration and void," and "to set out therein a complete statement of the facts upon which said second defense is based."

The defendant did not so amend, and for want of compliance with the order, the defense was stricken from the answer.

Was this error? is the only important question before us. There can be no doubt, that the plea of want of consideration for a note is entirely consistent with a denial of its execution and delivery, for under the liberal provisions of our code of practice, the defendant may set forth in his answer as many grounds of defense as he may have, whether they are legal or equitable in character, subject to the limitation, that such several defenses must be consistent with each other. Revised Statutes, Sec. 5067. This court held in *Pavey v. Pavey*, 30 Ohio St., 600, that, in an action on a note, the defendant may plead a denial of its execution and that there was no consideration therefor, and that it is error in such case to require the defendant to elect upon which of the two defenses he will proceed to trial.

If the note is not genuine, as alleged in the first ground, it had no consideration as alleged in the second ground of defense, and we think that the defendant had not only the right to these consistent defenses, but he had the right to be consistent in his

evidence to support them. So, if the instrument sued on is not genuine, what facts and circumstances connected with it, could he set out? Indeed, it is difficult to see how the defendant could have complied with the order made in the case, without abandoning his first defense, or at least, very greatly compromising it. If he should set out "facts and circumstances connected with the note which renders it without consideration," the plea so framed might at once be construed as admitting the execution of the instrument, and the very compliance with the order, if it could be complied with, would present an apparent inconsistency between the two defenses. And why should statements of facts be required in this case? The suit is between the payee and the alleged maker of the note. It lacks the usual words "for value received," and is not negotiable in form. Every fact surrounding its execution is, or could be, as well known to the plaintiff as to the defendant. If the note is not genuine, her knowledge about its origin is far superior to his. On the other hand, if the defendant made and delivered it, the plaintiff would not be a stranger to "the facts and circumstances" connected with its execution; and we think there is no necessity for the enforcement of the strict rule laid down by the trial court.

We do not intend to unduly circumscribe the discretion and control which the court has over the filing and reformation of pleadings, but to say, that owing to the character of the two grounds of defense, the court erred in sustaining the motion complained of and in striking the defense from the answer.

The case of *Chamberlain v. Railway Co.*, 15 Ohio

St., 225, is cited to justify the action of the lower court. There were several questions involved in that case, and the least of all was, the effect of going to trial without objection, where one of the defenses to a promissory note is a plea in general terms, that it is wholly without consideration; and this court there decided that, if the plaintiff, without requiring a statement of the facts on which the defense is based, joins issue, any evidence is admissible on the trial, that tends to impeach or sustain the consideration. And the distinguished judge announcing the opinion, referring to the general terms of the plea, said: "this the plaintiff might have required to be made more definite, by a statement of the facts upon which the defense was based; but he waived this right and joined issue. * * *."

And further examination of that case shows, that the defendant admitted the execution of the note in suit. He had subscribed to the stock of the railroad company, and had paid a number of installments thereon, and gave the note sued on in settlement of the other assessments, and among other defenses, we need not mention here, was the general plea that the note was without consideration. The feature of that case which readily distinguishes it from the case at bar, is that there the note was genuine, while here its execution is denied. It is the ordinary application of the rule that the syllabus and opinion in a case should be considered in the light of its issues and facts.

It is our judgment that the court erred in sustaining the plaintiff's motion to the second defense, and that the error was continued in striking it from the

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answer, for which error the judgments of the circuit court and the court of common pleas are reversed, and the case is remanded for new trial.

Judgment reversed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and
SHAUCK, JJ., concur.

BECKMAN, JR., ET AL. v. GARRETT.

Employee discharged before expiration of service—Because of default in duty—Actual injury need not be shown by employer—To justify discharge—Master and servant.

To justify the discharge of an employee before the expiration of the term of employment, it is sufficient for the employer to show that the employee was guilty of a default in duty whose natural tendency was to injure his business, and actual injury thereto need not be shown.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Garrett brought suit in the court of common pleas to recover from Beckman & Company damages alleged to have been sustained by him as the result of their breach of a written contract of employment whereby they had employed him for five years from March 1, 1894, to March 1, 1899, at a stipulated salary, and he had agreed to serve them for that period, his obligation being expressed in the following terms:

“In consideration of the foregoing the said Albert P. Garrett agrees to and does hereby enter into the employment of the said Beckman & Company upon the terms hereto set forth and agrees to devote all his time and attention to the interest of said parties of the first part.”

The plaintiff, admitting the performance of the contract until September 30, 1896, alleged that upon that date the defendants in violation of its terms and without his consent terminated the employment.

The answer admitted the execution of the contract upon which the plaintiff counted, and further alleged:

"That the plaintiff did not give to the business and interests of the defendants the time and attention required to be given by him thereto, under the terms of said agreement on the 18th, 19th and 28th days of September, 1896, on which said days the plaintiff, without the consent and against the wishes of the defendants, and without any cause, excuse or justification therefor, did wholly absent himself from the defendant's place of business and from his said employment, and during the whole of said days did utterly fail and neglect to perform the duties of his said employment, in utter disregard of the terms of his said agreement and to the great injury and inconvenience of these defendants. On account whereof these defendants did, on said 30th day of September, 1896, discharge the plaintiff from their said employment, as hereinbefore admitted.

By the reply the allegations of the answer were denied generally.

Upon the trial without objection, so far as the record discloses, the plaintiff first introduced his evidence. Three hundred and forty-seven pages of the printed record are required to present to us the evidence and other things which were recited to the jury in the form of evidence. From the evidence it appears with much repetition that the plaintiff was absent from the defendants' place of business on the days named in their answer. The plaintiff in ad-

vance of the defendants' evidence undertook to justify his absence by showing that it was in part for purposes consistent with his employment and in part in consequence of illness. Evidence was introduced by the defendants to show that the absence was not for purposes consistent with his employment nor on account of illness. There was no evidence to show the effect of the plaintiff's absence on the business of the defendants.

With enough amplification to make it entirely intelligible to the jury the following propositions were given for their guidance in determining the plaintiff's right to recover: First, if the plaintiff's absence from the defendant's place of business was with reasonable excuse or justification it did not in law warrant the defendants in terminating the contract of employment, and to defeat a recovery it was incumbent on the defendants to show not only the absence but also that it was without reasonable excuse. Second, that to defeat a recovery the defendants were bound to show not only that the plaintiff was absent without reasonable excuse, but, further, that his absence occasioned actual injury to their business. A verdict was returned for the plaintiff which was followed by a judgment which the circuit court affirmed.

Messrs. Meyer & Mooney, for plaintiff in error.

In the determination of the question submitted, the jury was instructed to regard the absence of the plaintiff below from his employment on the said days, and which absence constitutes the defense set forth in the answer, as substantially admitted. The said absence, we submit, was such breach of his contract of employment as would justify his discharge from

service, unless he should show, by proper evidence, that it was either authorized by his employers, or *involuntary and unavoidable* on his part. Such being the case, the burden of so showing was upon the plaintiff below. The court, however, charged to the contrary, in the following terms: "Now in reference to this matter, I say to you, gentlemen, that the burden of establishing that the absence of the plaintiff on those days was without excuse or reasonable justification rests, upon the issues presented in this case, in the judgment of the court, upon the defendants to establish by a preponderance of the evidence."

This, it is submitted, was clearly error to the prejudice of the plaintiffs in error. *Fowler v. Ice Company*, 1 McArthur, 14; *Harrington v. Iron Works Co.*, 119 Mass., 82; *Naylor v. Iron Works Co.*, 118 Mass., 317; *Libhart v. Wood*, 1 Watts & Serg., 265; 30 Georgia, 612; 163 N. Y., 351.

Messrs Sanders & Wilson, for defendant in error.

An employer always has the power to dismiss his employe from his service, but if such discharge be in violation of the contract of service, he must respond in damages. Hence the master must plead and prove justification for his act, because it is in contravention of the terms of his contract. The courts uniformly hold that the discharge must be justified. Mere absence, unless prolonged, is not sufficient. *Wood's Master and Servant*, 226. The burden of proof is therefore upon the master to establish the justification where he relies upon it to defeat the claim.

Mr. Beckwith himself testifies that Mr. Garrett's absence on those days was unnoticed and not objectionable, and he did not seek to justify his discharge for this absence, but for the "drunkenness and carousing." His absence on the 19th was "*unavoidable*"

and "involuntary." His absence was not unreasonable of itself in view of the contract—the nature of the business and the effect upon the business. Hence the burden still remained upon the master to show that such absence was without cause or justification.

The authorities are numerous and uniformly sustain this proposition. *Milligan v. Furniture Co.*, 111 Mich., 629; *Morris v. Taliaferro*, 75 Ill. App., 182; *Stevens v. Stephens*, 14 Utah, 255; *Babcock v. Appleton Mfg. Co.*, 93 Wis., 124; *Crawford v. Mail Pub. Co.*, 47 N. Y. Supp., 747; *McMullan v. Dickinson Co.*, 63 Minn., 405; *Green v. Washburn*, 7 Atl. Rep. (Mass.), 390.

Upon this branch of the charge touching master's interests, we call attention to the entire charge.

Wood's Master and Servant, page 216, says: "That every case (discharge) must be determined by the contract—the nature of the business and the effects upon the master's interests."

Did Mr. Garrett's absence of two days, all told, injuriously affect the master's interests? If such absence was without reasonable excuse, did it injure the business of the defendants?

This was, in effect, saying that not every absence without permission or excuse will justify the master in discharging his servant. If this particular absence was without excuse by reason of the circumstances attending it, still you will inquire further as to the effect upon the master's interest. If it did not injure the master's interests and the absence of itself was not unreasonable in length, then, etc. Wood's Master and Servant (2 ed.), 211.

The defendants were manufacturers of horse blankets and lap robes, and Mr. Garrett, as their salesman, came in contact with dealers in hardware

and harness men. Hence there was nothing in Mr. Garrett's conduct incompatible with the nature of Beckman's business, though he occasionally drank a glass of beer.

Mr. Beckman testified that he and his father drank it habitually, or when he felt like it, and that he had invited Mr. Garrett to drink with him on numerous occasions.

It was customary for the firm to drink. To charge Mr. Garrett with misconduct on account of drunkenness on those days, and that the same injuriously affected their business, devolves upon the defendants the burden of proving it.

Mr. Beckman testified that he did not discharge Mr. Garrett for absence; that his absence was all right, but it was the injurious effect upon his business which would result from his habitual drunkenness.

He waived all objections to his absence on the 18th and 19th, and again waived it on the 29th for absence on the 28th, and he so states in his testimony. Hence he relied upon the effects upon his business of Garrett's misconduct to justify his discharge, and it was not error to so direct the jury.

SHAUCK, J. The correct rule as to the obligation of the plaintiff under his contract of employment appears to have been given to the jury in the general terms of the charge. And the instruction that the defendants in order, to justify a rescission of the contract before the expiration of the time, were required to show the unjustifiable absence of the plaintiff from their place of business seems to be unobjectionable. But it is insisted that the defendants should not have been required to show that such unreasonable ab-

sence resulted in actual injury to their business. There being no evidence of such actual injury, the instruction upon that point was equivalent to a direction to return a verdict for the plaintiff. Such direction might have been given with entire propriety if proof of actual injury was, in a correct view of the law, essential to the defense.

It is, however, manifest that in giving this instruction the trial judge failed to discriminate between a cause of discharge and a cause of action. The established rule upon the subject is that the employer may discharge for misconduct whose necessary tendency is to the injury of his business. If the discharge had been for the plaintiff's misconduct while present and attending to his duties, nothing more could have been required of the defendants in that respect than to show misconduct having such tendency. Such was the inevitable tendency of the plaintiff's absence from the place where his duties were to be performed. Nothing should have been required of the defendants below except to show that the admitted absence of the plaintiff was without reasonable excuse. *Jerome v. Queen City Cycle Co.*, 163 N. Y., 351.

Judgment reversed.

BURKET, DAVIS and PRICE, JJ., concur.

HOFFMAN, ADMX., ET AL. v. FLEMING.

Action on bond of executor—Bond approved by probate court—Bond recites appointment of executor and directions as to execution of administration by executor—Sureties on such bond estopped to deny due appointment of executor.

In an action on the bond of one who was appointed executor by the probate court, the bond being approved by said court and containing a recital that the principal therein had been appointed executor of the last will and testament of the testatrix, and also containing a condition that "the said principal as executor as aforesaid shall administer according to law and the will of the testatrix all her goods, chattels, rights and credits, and the proceeds of all her real estate that may be sold for the payment of her debts or legacies which shall or may come to the possession of the executor or to the possession of any other person for her," and upon which appointment and giving of said bond assets of the estate passed into the hands of the principal as such executor, the sureties on such bond will be estopped from showing in defense that their principal was not duly appointed as executor, or that the will was not duly probated.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Franklin county.

This action was begun by the defendant in error in the court of common pleas by a petition in which she says that one Margaret H. Fleming died in April, 1891, leaving a last will and testament which was filed and admitted to probate by the probate court of Franklin county on the first of May, 1891; that one Ripley C. Hoffman was named in the will as executor thereof, and on the first day of May, 1891, he was appointed by said probate court as executor of the said will, and that upon his appointment as such executor he gave a bond with sureties, executed in the form prescribed by law, of which the following is a copy:

"We, Ripley C. Hoffman, Zeno C. Payne, F. F. Hoffman, James Fullerton, Mary Walden, Michael Haviland and John G. McGuffey, are bound unto the state of Ohio, in the penal sum of one hundred and fifty thousand dollars, to the payment of which we hereby jointly and severally obligate ourselves. Witness our hand and seals, this first day of May, A. D. 1891.

"The condition of the above obligation is such, that, whereas the above bound Ripley C. Hoffman has this day been appointed by the probate court of Franklin county, in the state of Ohio, executor of the last will and testament of Margaret H. Fleming, late of Brooke county, West Virginia, deceased.

"Now, if the said Ripley C. Hoffman, as executor as aforesaid: First, shall make and return to the court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights and credits of the testator, which are by the laws to be administered, and which shall have come to his possession or knowledge; and also if required by the court, an inventory of the real estate of said deceased; Secondly, shall administer according to law, and to the will of the testator, all her goods, chattels, rights and credits, and the proceeds of all her real estate, that may be sold for the payment of her debts or legacies which shall at any time come to the possession of the executor, Ripley C. Hoffman, or to the possession of any other person for her; And, thirdly, shall render, upon oath, a just and true account of his administration within eighteen months, and at any other times when required by the court or the law; and failing to do so, for thirty days after he shall have been notified of the expiration of the time by the probate judge,

he shall receive no allowance for services, unless the court shall enter upon its journals that such delay was necessary and reasonable; then this obligation to be void; otherwise in full force and virtue in law.

"Attest:

"RIPLEY C. HOFFMAN, (Seal)

"ZENO C. PAYNE, (Seal)

"F. F. HOFFMAN, (Seal)

"JAMES FULLERTON, (Seal)

"MARY WALDEN, (Seal)

"MICHAEL HAVILAND, (Seal)

"JOHN G. MCGUFFEY, (Seal)

"Filed and approved this first day of May, A. D. 1891. LORENZO D. HAGERTY, Probate Judge."

Plaintiff further alleged that a large amount of assets of the estate of Margaret H. Fleming came into the possession of the said Ripley C. Hoffman, as such executor, and that on the 19th of March, 1894, he filed his first account in the probate court, upon which the sum of \$26,552.34 was found to be in his hands; that on the 30th of November, 1896, he filed his second account in the probate court, and the sum of \$22,761.62 was found to be in his hands due to the estate, and that he had not filed any further account. The petition also alleges that under item thirty-one (31) of the said last will and testament of Margaret H. Fleming the plaintiff was entitled to a legacy of \$1,500, and that on the fifth of August, 1897, said probate court found that there was due to the plaintiff, as legatee, under the said will, the sum of \$1,239.09, with interest from the first day of February, 1896, and also interest on \$261.91 from the twenty-first day of February, 1896, to the ninth of July, 1896,

and ordered the executor to pay the plaintiff these amounts, and that the plaintiff has at various times demanded that the executor pay the legacy and the sums so found due her, but that he has neglected and refused to pay the same or any part thereof. And she prays judgment against the said Ripley C. Hoffman as executor and the other defendants as sureties upon the executor's bond, for the amount so found due her.

The second amended answer of the defendants, for the first defense, admits that Margaret H. Fleming died as alleged, leaving a last will and testament, which was filed and pretended to be admitted to probate by the probate court of Franklin county, and that the will named Ripley C. Hoffman, as executor thereof, and that the court pretended to appoint him executor of the will and that he attempted to qualify as said executor, and attempted to act in that capacity toward the settlement of the estate of Margaret H. Fleming, deceased, and that he executed the bond set forth in the petition, with the conditions stated in the petition, and that a large sum of money came into the possession of said Ripley C. Hoffman, as pretended executor, as assets of the estate of Margaret H. Fleming, deceased; also admits the amounts stated in the petition, and admits that item 31 of the last will and testament of Margaret H. Fleming is as stated in the petition, and that the probate court did find sums alleged to be due to the plaintiff, but they deny that the conditions of the bond have been broken or that any obligation rests upon the defendants by reason thereof, because the said Margaret H. Fleming was at the time of her death a resident of Brooke county in the state of West Virginia, and that the

statute of that state relative to the probating and recording of wills of persons dying testate and domiciled in said state, provides as follows: "Section 22. The county court shall have the power and jurisdiction to hear proof of and admit wills to record as follows: First. In the county wherein the deceased at the time of his death had a mansion house or known place of residence, or, second, if he had no such house or place of residence, then in the county wherein any real estate devised thereby, is situated."

The defendants further say that Margaret H. Fleming never resided in Franklin county, Ohio; that she did not own any real or personal estate in said Franklin county; that she never was in business in Franklin county; that she did not at the time of her death owe any debt or debts to any person whomsoever residing in the state of Ohio, and no creditor of hers asked to have her said will proven, probated and admitted to record in said Franklin county, and no such debtor or debtors asked for letters of administration on her estate in Franklin county, and that her will was never admitted to probate in Brooke county, West Virginia, and that when application was made to the probate court of Franklin county for proving and admitting said will the said probate court knew, and the record of its proceedings in that behalf pretending to admit said will to probate show, and the said probate court found, that said Margaret H. Fleming, deceased, was, at the time of her death, a resident of and domiciled in Brooke county, West Virginia. So that the defendants say that the probate court of Franklin county, Ohio, had no jurisdiction or power to take proof of the execution of said will, no power or authority to probate and order the

same to be recorded, and no power or jurisdiction to issue letters testamentary thereof to Ripley C. Hoffman, or any other person, on the estate of said Margaret H. Fleming, deceased, and had no jurisdiction or power to require any bond to be given by said Ripley C. Hoffman, and it had no power or jurisdiction to approve such bond and that the bond is null and void and they deny that they have any liability thereon.

In the second defense the defendants repeat substantially the same facts alleged in the first defense, and claim that by reason thereof no rights vested in the plaintiff as legatee under said will.

The third and fourth defenses are not material to the questions considered in the opinion.

The second amended reply to the amended answer denies that the record of the proceedings of the probate court of Franklin county, Ohio, admitting to probate and record the will of Margaret H. Fleming, shows that the said probate court knew or found that said testatrix was, at the time of her death, a resident of Brooke county, West Virginia. Plaintiff says that Margaret H. Fleming owned real estate and chattel property in Franklin county at the time of her death, was engaged in the prosecution of business in Franklin county, and owed debts in Franklin county, and that one of her creditors asked to have said will probated in Franklin county, and the plaintiff denies each and every other allegation and statement made in the first defense except such as are averred in her petition in reply.

For reply to the second defense the plaintiff admits that the statutes of West Virginia, relating to the probating and recording of wills of persons dying

testate and domiciled in the state, are substantially as set forth. She admits that no letters testamentary were ever issued in West Virginia and no administration had there. But the plaintiff denies that at the time the will was offered for probate in Franklin county, Ohio, the probate court knew and found, or that the records of said court show, that Margaret H. Fleming was, at the time of her death, a resident of West Virginia. The plaintiff alleges that she was at the time of her death engaged in the prosecution of business in Franklin county, owned real estate and chattel property there, owed debts there, and that one of her creditors asked to have the will probated there, and denies each and every other allegation in the second defense except such as are averred in the petition.

The plaintiff demurred to the first and second defenses of the answer of the defendants, which demurrer was overruled.

The cause was tried in the common pleas court upon the issues thus joined and the testimony adduced by the defendant in error, including certain record evidence, in the records of the probate court of said county, relating to the probating of said will and the appointment of said executor, the accounts of said executor therein filed and certain oral testimony, and the plaintiffs in error moved the court to dismiss the action because on the testimony thus offered and the facts admitted in the pleadings the defendant in error was not entitled to judgment against the plaintiffs in error and had no right to prosecute and maintain the action. This motion was sustained and judgment was entered against the defendant in error and in favor of the plaintiffs in error, and the peti-

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tion of the defendant in error was dismissed at her costs. The defendant in error filed a motion for a new trial which was overruled, and error was prosecuted in the circuit court of said county against the plaintiffs in error, in which court the judgment of the court of common pleas was reversed upon the ground that the said court erred in overruling the demurrer of the defendant in error to the first and second defenses of the amended answer, and because it further erred in sustaining said motion at the close of the testimony of defendant in error. And the plaintiffs in error now prosecute their petition in error in this court to reverse the judgment of the circuit court and to be restored to all the rights that they have lost by reason of said reversal.

Mr. G. J. Marriott; Mr. John G. McGuffey; Mr. F. F. Hoffman and Mr. Thomas H. Ricketts, for plaintiffs in error, cited the following authorities:

Pennywit v. Foote, 27 Ohio St., 600; *Spier v. Corll*, 33 Ohio St., 236; *Paine v. Mooreland*, 15 Ohio, 435; *Van Fossen v. State*, 37 Ohio St., 317; *Hamilton v. Merrill*, 37 Ohio St., 682; *Homan v. Brinkerhoff*, 1 Denio, 184; *Faulkner, In matter of*, 4 Hill (N. Y.), 598; *Steamboat General Buell v. Long*, 18 Ohio St., 521; *The Belfast*, 74 U. S. (7 Wall.), 624; *Norse v. Presby.*, 25 N. H. (5 Foster), 299; *Gilliland v. Sellers*, 2 Ohio St., 223; *Eaton v. Badger*, 33 N. H., 228; *Mansley v. Robinson*, 28 La. An., 793; *Ponce v. Underwood*, 55 Ga., 601; *Lyles v. Bowles*, 8 S. C., 258; *Western U. T. Co. v. Taylor*, 84 Ga., 408; *Beverly v. Burke*, 9 Ga., 440; *Swiggert v. Harper*, 4 Scam., 364; *St. Louis S. C. Co. v. Sandoral C. Co.*, 111 Ill., 32; *Frankel v. Saterfield*, 19 Atl. Rep., 898; 12 Am. &

Eng. Ency. Law (1 ed.), 311; *Ream v. Wolls*, 61 Ohio St., 131; *Gilpin v. Williams*, 25 Ohio St., 283; *King v. Bell*, 36 Ohio St., 460; *Shroyer v. Richmond*, 16 Ohio St., 455; *Swearingen v. Morris*, 14 Ohio St., 424; *Manuel v. Manuel*, 13 Ohio St., 458; 1 Curwen, 708; *Barr v. Closterman*, 1 Circ. Dec., 546; 2 C. C. R., 387; *Carpenter v. Denoon*, 29 Ohio St., 379; Murfree on Official Bonds, Par. 362; *Earle v. Crum*, 47 Miss., 165; *Steward v. Morrison*, 38 Miss., 417; *Atkinson, Ex parte*, 40 Miss., 17; *Crum v. Wilson*, 61 Miss., 233; *Brown v. Bradford*, 30 Ga., 927; *Hempstead v. Coste*, 36 Mo., 437; *Ames v. Maclay*, 14 Iowa, 281; *Dickson v. Bell*, 13 La. An., 249; *Miller v. Gasklus*, 1 Smedes & M., 524; *Beall v. Cochran*, 18 Ga., 38; *Adams v. Gleaves*, 10 Lea (Tenn.), 363; *Foster v. Wick*, 17 Ohio, 250; *Tyron v. United States*, 32 C. T. C. L. 425; Brant on Suretyship, Par. 121; *Boyd v. Swing*, 38 Miss., 182; *City v. Riley*, 40 Miss., 488; *Dickenson v. State*, 20 Neb., 72; *Bank v. Mixer*, 124 U. S., 721; *Coleman v. Beam*, 32 How. Pr., 370; *Cadwell v. Colgate*, 7 Barb., 253; *Carpenter v. Tursell*, 100 Mass., 450; *Tapley v. Goodsell*, 122 Mass., 176; *Converse v. Starr*, 23 Ohio St., 491; *McNeal v. Ross*, 58 Ohio St., 707; *Scobey v. Gano*, 35 Ohio St., 550; 12 Am. & Eng. Enc. Law, 908; *Cutts v. Haskins*, 9 Mass., 543; *Beckett v. Selover*, 7 Cal., 215; 1 Chit. Cr. Law, 209; Stark. Cr. Pl., 65; *King v. Yandell*, 4 Term, 521; *Limes v. Irwin*, 16 Ohio St., 488; *Bustard v. Dabney*, 4 Ohio, 68; Woerner Am. Law of Administration, 464; 5 Ired. Law, 267; *Booth v. Timony*, 3 Dem. Surrogates Court, N. Y., —; *Conant v. Newton*, 126 Mass., 105; *Olds v. State*, 6 Blackf., 91; *Wilson v. Hobday*, 4 M. & S., 121; Com-

monwealth v. Jackson, 1 Leigh, 485; *Sherry v. Foresman*, 6 Blackf., 56; *Byers v. State*, 20 Ind., 47; *Benedict v. Bray*, 2 Cal., 251; *Caffrey v. Dudgeon*, 38 Ind., 518; *Werner Probate Courts in America*, star page, 323; *Hoxie v. Small*, 86 Me., 23; *Devlin v. Smith*, 89 N. Y., 470; *Mohr v. Tulip*, 40 Wis., 66; *Epping v. Robinson*, 21 Fla., 48; *Douglass v. Scott*, 5 Ohio, 195; *Kelly v. State*, 25 Ohio St., 567; *Herman on Estoppel*, 52; *Adams v. Jeffries*, 12 Ohio, 253; *State v. Medary*, 17 Ohio, 554; *Myres v. Parker*, 6 Ohio St., 501; *Hall v. Williamson*, 9 Ohio St., 17; *State v. Cutting*, 2 Ohio St., 1; *State v. Corey*, 16 Ohio St., 17; *Carpenter v. Kent*, 11 Ohio St., 554; *Smith v. Huesman*, 30 Ohio St., 662; *Davis v. Davis*, 11 Ohio St., 386; *Walker v. Walker*, 2 Re., 568; 4 W. L. M., 32; *Sheldon v. Newton*, 3 Ohio St., 494; *Swazey v. Blackburn*, 8 Ohio, 5; *Speed v. Kelly*, 35 Miss., 54; 1 Woerner on Am. Law of Administration, 205; *Perry v. Railroad*, 29 Kan., 420; *Wallace v. Wallace*, 2 Green Ch. Rep., 616; *Sturdivant v. Neil*, 27 Miss., 157; *McNeal v. Ross*, 1 O. S. C. D., 777; 39 W. L. B., 353; *Moore v. Starks*, 1 Ohio St., 369; *Buchanan v. Roy*, 2 Ohio St., 251; *Fowler v. Whiteman*, 2 Ohio St., 270; *Callen v. Ellison*, 13 Ohio St., 446; 12 Am. & Eng. Ency. Law (1 ed.), 306, note 5; *Wildman v. Rider*, 23 Conn., 172; *Brownfield v. Weicht*, 9 Ind., 394; *Wickliffe v. Bailey*, 5 Mon. (B.), 253; *Riley v. Lowell*, 117 Mass., 176; 12 Am. & Eng. Ency. Law (1 ed.), 306, note 5; *Coleman's Appeal*, 75 Pa. St., 441, 460; *Doctor v. Hartman*, 74 Ind., 221; *Mathie v. McIntosh*, 40 Wis., 120; *Thomson v. Steamboat*, 2 Ohio St., 26; 12 Am. & Eng. Ency. Law (1 ed.), 308 and note 1; *Elliott v. Piersol*, 26 U. S. (1

Pet.), 328; *Hickey v. Stewart*, 44 U. S. (3 How.), 750; *Thompson v. Whitman*, 85 U. S. (18 Wall.), 457; *Christmas v. Russell*, 72 U. S. (5 Wall.), 290; *Bissell v. Briggs*, 9 Mass., 462; *Pennywoit v. Foote*, 27 Ohio St., 600; *Gary v. Larrimore*, 2 Abb. (U. S.), 542; *Scobey v. Gano*, 35 Ohio St., 550; *Gilliland v. Sellers*, 2 Ohio St., 223; *Thompson v. Springer*, 9 Ga., 130; 1 Black on Judgments, Secs. 218, 278, note; *Adams v. Jeffries*, 12 Ohio, 253; *Mawsom v. Sawyer*, 12 Ohio, 195; *State v. McGehan*, 27 Ohio St., 280; 1 Freeman on Judgments, Sec. 117; *Fisk v. Norvel*, 9 Tex., 13; *Reed v. Wright*, 2 G. Greene (Iowa), 15; *Myers v. State*, 19 Ind., 127; *Macey v. Ticombe*, 19 Ind., 135; *Butler v. Wadley*, 15 Ind., 502; *Skelton v. Bliss*, 7 Ind., 77; *Ellis v. State*, 2 Ind., 262; *Marshall v. State*, 8 Blackf., 162; *State v. Lynch*, 6 Blackf., 395; *Spader v. Frost*, 4 Blackf., 190; *Martin v. Kennard*, 3 Blackf., 430; *Silver v. Grovenor*, 4 Blackf., 15; *Parker v. Henderson*, 1 Ind., 62; *State v. Inman*, 7 Blackf., 225; *Thompson v. Lockwood*, 15 Johns., 256; *Germond v. The People*, 1 Hill (N. Y.), 343; *Perry v. Hensley*, 14 Mon. (B.), 381; *Buckingham v. Bailey*, 4 Smed. & M., 538; *Tarbell v. Gray*, 4 Gray, 444; *Green v. Haskell*, 24 Me., 180; *Libby v. Main*, 2 Fairfield, 344; *Bridge v. Ford*, 4 Mass., 641; *Brockenborough v. Melton*, 55 Tex., 493; *Arnold v. Arnold*, 62 Ga., 627; *Tant v. Wigfall*, 65 Ga., 412; *Dequindre v. Williams*, 31 Ind., 144, 456; *Johnson v. Beazley*, 65 Mo., 250; *Shroyer v. Richmond*, 16 Ohio St., 455; *Abbott v. Coburn*, 28 Vt., 663; *Irwin v. Scriber*, 18 Cal., 499; *Quidort v. Fergeaux*, 18 N. J. Eq. 472; *Galpin v. Page*, 18 Wall., 350; *Randolph v. Bayne*, 44 Cal., 366; *Fisher v. Bassett*, 9 Leigh, 119; 33 Am. Dec., 227, 231, notes; Bigelow on Estoppel,

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361; *Cutler v. Dickinson*, 8 Pick., 385; 2 Bouvier's Law Dic., 57; 19 Am. & Eng. Ency. Law (1 ed.), 173; *Myers v. Smith*, 50 Kan., 1; 3 Redfield on Wills, 2; *Capper's Will, In re*, 85 Iowa, 82; Story Conflict of Law, Sec. 18; 1 Wait Actions and Defense, 10; 1 Am. & Eng. Ency. Law (1 ed.), 180; *Norris v. Lapsley*, 5 Cal., 47; *Kerr v. Moon*, 1 O. F. D., 114; 22 U. S. (9 Wheat.), 565; 24 Am. & Eng. Ency. Law (1 ed.), 574; Brown on Jurisdiction (2 ed.), 47; Page on Wills, Sec. 315; Bailey on Juris., Sec. 215a.

Mr. W. T. S. O'Hara; Mr. P. S. Lowry and Mr. M. E. Thrailkill, for defendant in error, cited the following authorities:

Woerner's Am. Law Admrs., Sec. 157; *Swearingen v. Morris*, 14 Ohio St., 424; *Limes v. Irwin*, 16 Ohio St., 488; *Manuel v. Manuel*, 13 Ohio St., 458; *Booth v. Timony*, 3 Den., 416; *Jacques v. Horton*, 76 Ala., 238; *Varner v. Bevil*, 17 Ala., 286; *Hyman v. Gaskins*, 5 Ired., 267; *Gordon, In re*, 50 N. J. Eq., 397; *Shroyer v. Richmond*, 16 Ohio St., 466; *Bailey v. Bailey*, 8 Ohio, 239; *Railway Co. v. Mahoney*, 15 S. W. Rep. 652; *Johnston v. Smith*, 25 Hun, 171; *Chapman v. Brite*, 23 S. W. Rep., 514; *Paine v. Mooreland*, 15 Ohio, 444; *Dequindre v. Williams*, 31 Ind., 444; *Cox v. Thomas*, 9 Grat., 323; *Grignon v. Astor*, 43 U. S. (2 How.), 319; *Doe v. Smith*, 1 Ind., 451; *Sprague v. Litherberry*, 2 O. F. D., 574; 4 McLean, 442; *Rhode Island v. Mass.*, 37 U. S. (12 Pet.), 718; *Railroad Co. v. Belle Center*, 48 Ohio St., 273; *Reed v. Reed*, 81 Ky., 267; *Broderick Will case*, 88 U. S. (21 Wall.), 503; *Hollrah v. Lasance*, 63 Ohio St., 58; Black on Judgments, Sec. 274; *Mitchell v. Holder*, 8 Bush, 362; *Douglass v. Scott*, 5 Ohio, 198; *Hauenstein v. Gilles-*

pie, 19 So. Rep., 673; *Norton v. Miller*, 25 Ark., 108; *Iredell v. Barbee*, 9 Ired., 250; *Williams v. Woodman*, 73 Me., 163; *Gray v. State*, 78 Ind., 68; *Insurance Co. v. Findley*, 59 Ia., 591; *Shalter & Ebling's App.*, 43 Pa. St., 83; *Burnett v. Nesmith*, 62 Ala., 261; 2 Herman on Estoppel, Sec. 992; Bigelow on Estoppel (5 ed.), 373; *Risley v. Howell (Vil.)*, 64 Fed. Rep., 453; *Portland v. Paving Co.*, 72 Am. St. Rep., 713; *McChord v. Fisher*, 13 B. Mon., 193; *Field v. Van Cott*, 15 Abb. (N. Y.) Pr., 349; *Williamson v. Woodson*, 73 Me., 163; *Wayman v. Taylor*, 1 Dana (Ky.), 527; *Jones v. Gallatin Co.*, 78 Ky., 491; *Stockton v. Turner*, 7 J. J. Marsh. (Ky.), 192; *Levi v. Dorn*, 28 How. (N. Y.) Pr., 217; *Kellar v. Beeler*, 4 J. J. Marsh. (Ky.), 655; *Love v. Rockwell*, 1 Wis., 382; *Cutler v. Dickinson*, 8 Pick. (Mass.), 386; *Fake v. Whipple*, 39 Barb., 339; *Cadwell v. Colgate*, 7 Barb., 253; *Bauk v. Wagner*, 33 La. An., 732; *Carlton v. Dixon*, 12 Ore., 144; *Johnson v. Weatherwax*, 9 Kan., 75; *Nun v. Goodlett*, 10 Ark., 89; *McDermott v. Isabell*, 4 Cal., 113; *State v. Stark*, 75 Mo., 566; *Daniels v. Tearney*, 102 U. S., 415.

DAVIS, J. We do not decide the question, mooted in this case, whether the probate court of Franklin county might admit to probate the will of a testator domiciled in another state, in any other way than by admitting to record an authenticated copy of the will, executed and proved according to the laws of the state where the testator was domiciled; but in order to make entirely clear the grounds upon which the judgment of this court is placed it is deemed proper to define the general jurisdiction of the probate court. By the constitution it is made a court

of record, and it is declared that it shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, and the settlement of accounts of executors, administrators and guardians. Constitution, Art. 4, Secs. 7 and 8. *Prima facie*, then, whatever is done by the probate court in these matters is done by the proper authority or tribunal. Following the provisions of the constitution, the general assembly has provided, Revised Statutes, section 524, that the probate court shall have exclusive jurisdiction to take the proof of wills, and to admit to record authenticated copies of wills, executed, proved, and allowed in the courts of any other state, territory or country; to grant and revoke letters testamentary and of administration; and to direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates. These statutory provisions do not, and can not, limit or enlarge the jurisdiction of the probate court in the matters mentioned. Whatever is done, therefore, by the probate court in the matters of probate of wills, appointment of executors and administrators and directing and controlling the accounting of such executors and administrators is presumptively within the jurisdiction of the court. To use the language of this court in *Shroyer v. Richmond*, 16 Ohio St., 455, *paragraph 7 of the syllabus*, "the record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it." Just here, however, inasmuch as the application for letters testamentary, the journal entry admitting the will to probate and the

recitals in the bond, all describe the will as the last will and testament of Margaret H. Fleming, "late of Brooke county, West Virginia, deceased," the plaintiffs in error insist that on the face of the record it appears that the probate of the will, the appointment of the executor, the approval of the bond, and all subsequent proceedings were void, the testatrix being a non-resident of the state.

We have consulted all of the standard dictionaries of the English language and several of the best law dictionaries, and we do not find that the word "late" is ever used in the sense of *last*, but always, when used as here, in the sense of *recently* or *formerly*. We have found but one case, *Beckett v. Selover*, 7 Cal., 215, in which it seems to have been construed in the sense of "last," while in *Holmes v. Custance*, 12 Ves. Jr., 279, where the description was "Robert Holmes, late of Norwich," Sir William Grant, Master of the Rolls, said: "Everyone knows that the sense of 'late' is not recently, but formerly, of Norwich." So that it cannot be said here, with certainty, that the record impeaches itself by clearly showing that the testatrix was not a resident of the jurisdiction which admitted her will to probate and appointed an executor thereof. We cannot know what evidence may have been adduced in the probate court of Franklin county, Ohio, to show that the last residence of the testatrix was within the jurisdiction of the court. Neither the verity of the record nor the jurisdiction of the court to do what it did do, was challenged in any direct proceeding. Can it be done now in this action? This is an action by a legatee under the will against the executor and his sureties, on the executor's bond.

The recital of the bond, which is in due form, is that Ripley C. Hoffman has been *appointed*, by the probate court of Franklin county, Ohio, *executor of the last will and testament* of Margaret H. Fleming. One of the conditions of the bond is that the "said Ripley C. Hoffman as executor as aforesaid shall administer according to law and the will of the testator" all her goods, chattels, rights and credits, etc. Thus the facts that Margaret H. Fleming died leaving a will and that Ripley C. Hoffman, the principal in the bond, was the executor of that will, are formally stated and made the basis of the contract. As was said by this court long ago, "In cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing." For example, if a condition be that a man and his wife shall do an act, the man will be estopped to say he has no wife; or if the condition be to perform the covenants of an indenture, the obligor is estopped to say there is no indenture. *Douglass v. Scott*, 5 Ohio, 194, 198; Herman on Estoppel, Secs. 634, 636. The obligors cannot be allowed to blow hot and cold; in one breath obtaining control of the estate by vouching for the official character of the principal, recognizing the will under which he was appointed and holding themselves bound for due administration according to law and the will, and in the next breath denying the will and fiduciary relation of the principal and maladministering the property of legatees with impunity. It does not lie in their mouths to say that there was no legal validity in the acts by which they obtained the possession of the property. Their bond, given under the order of, and approved by, the court, gave color to the execu-

torship of Hoffman, and after the estate has been administered by him for years, under the orders of the court appointing him, and in accordance with the will, until a deficit occurs, it is too late for the obligors on the executor's bond to say that the court had no jurisdiction to probate the will or to appoint the executor; that there is no will and that there never was an executor. *Kelly v. State*, 25 Ohio St., 567, 577, 578.

Nevertheless the counsel for the plaintiff in error strenuously and ably argue that the sureties may show that the appointment of the executor was without jurisdiction, unauthorized by law and void, and that they may thus be discharged from liability on their bond. It is not to be denied that this position has some support among reported cases, notably in Mississippi and Georgia; but it seems to us that the weight of authority is distinctly and overwhelmingly against it. Indeed, if the doctrine of estoppel may be applied to sureties on an administration bond, or a guardian's bond, so that by its recitals they may not be allowed to deny that their principal has been duly appointed (Bigelow on Estoppel, 373; Herman on Estoppel, Sec. 634), it is difficult to perceive how a want of jurisdiction in the appointing court could alter the rule. The effect of the recitals is just the same, and it would be just as inequitable not to estop the obligors in the case where the appointment was made without jurisdiction, and assets obtained thereby, as in a case where it was made irregularly by a wrongful exercise of jurisdiction. Accordingly it was said in New York that "the execution of the bond precludes both principals and sureties from gainsaying the surrogate's jurisdiction in any pro-

ceedings for the assets which the appointment and bond enabled the principal to receive." *People v. Falconer*, 2 Sandf. 81, 83; (Superior Ct.) approved in *Johnston v. Smith*, 25 Hun (N. Y.), 171. In *Harbaugh v. Albertson*, 102 Ind., 69, when in replevin proceedings before a justice of the peace, a surety on the replevin bond by his execution thereof enabled the plaintiffs in the replevin to obtain the possession of the property in controversy, it was held that "the surety should be estopped from setting up as a defense to an action on the bond, that the justice before whom the action was commenced, had no jurisdiction over the persons of the parties."

In *McCord v. Fisher's Heirs*, 13 Mon. (B.), 193, it was held that an administration granted in a different county from that in which the decedent was domiciled at his death, and in which the decedent had no estate, conferred no authority; but that a bond given by such administrator is binding upon him and his sureties, not as a statutory, but as a common law, bond, being upon good consideration and not against the policy of the law. In *Iredell v. Barbee*, 9 Iredell (N. C.), 250, it was held that where a court has no power to appoint a guardian, but does appoint one, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity on the ground of want of power in the court to make the appointment.

In *McDermott v. Isbell*, 4 Cal., 113, the Supreme Court of California held that "a party who avails himself of the process of an inferior court cannot escape the responsibility of his own act upon the ground that such tribunal has no jurisdiction over

the subject-matter in controversy. Consequently a party who sues out a writ of replevin from a justice of the peace having no jurisdiction, and obtains property, in an action on the replevin bond cannot set up as a defense the want of jurisdiction of the justice. Neither can he be allowed to show that the property so replevined was his own. The conditions of the bond are to prosecute the suit with success or to return the property."

It was held in Arkansas, *Norton v. Miller*, 25 Ark., 108, that it is irregular and erroneous for the probate court of one county to appoint a guardian for minors who reside with their property in another county; and that both the principal and the sureties on the guardian's bond are estopped from denying the truth of the recitals in the bond that the principal was appointed and that they will not be permitted to deny the jurisdiction of the court making the appointment.

In *Cutler v. Dickinson*, 8 Pick., 386, it appeared on examining the records of the probate office, that there was no decree, nor any other evidence of the appointment of the administrator; yet in a suit on the bond of the administrator it was held that the obligors were estopped to deny that the principal was appointed administrator.

In Pennsylvania, where an act of assembly prohibits registers from granting original letters of administration on the estates of persons who have been dead twenty-one years, unless ordered by a register's court, it was held that letters of administration granted in violation of this act were not absolutely void to all intents and purposes, and that, notwithstanding such prohibition, an administrator acting

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under such letters and his sureties, are liable on their bond to the parties interested in the estate. The court, per Lowrie, C. J., say: "Even if we should regard the letters as void, as affecting the estate, we should not regard them as void, as affecting the accountability of the persons acting under them. We should then treat the administrator as a usurper, and his sureties as aiding him in his acts, and then we would not allow them to set up the usurpation as a protection against accountability for it; for a man cannot take advantage of his own wrong, or set it up as a defense." *Foster v. Commonwealth*, 35 Pa. St., 148. This case was followed in *Shalter and Ebling's Appeal*, 43 Pa. St., 83.

The People v. Norton, 9 N. Y., 176, was a case in which a court having general jurisdiction of all cases of trust made an irregular and erroneous appointment of a trustee, no notice of the proceeding having been given to the *cestuis que trust*, and this was set up as a defense in an action on the trustee's bond. The court, per Ruggles, C. J., said that: "This is an objection which neither the trustee nor his surety can be allowed to make. Lynch (the trustee) got possession of the trust estate under the proceedings by color of which he claimed to be trustee, and Norton voluntarily undertook as his surety that he should faithfully administer the trust. If the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in a proper manner for that cause; but Lynch, after having obtained the property upon the pretense of being the trustee, cannot be permitted to deny his liability to account as such. The defendant who became his surety in order

that he might take the trust property, is for a like reason precluded from denying his liability as surety." This case was cited with approval in *Bassett v. Crafts*, 129 Mass., 513, in which it was held that the sureties on a trustee's bond cannot in an action against them on the bond, impeach the validity of the principal's appointment.

In *Gray v. State*, 78 Ind., 68, upon an extended review of authorities, it was held that the surety on a guardian's bond, executed to enable him to sell his ward's real estate, is estopped, after the sale and receipt of the money, to deny the appointment of the guardian. The same doctrine runs through the following cases: *Fridge v. State*, 3 Gill & Johnson (Md.), 103; *People v. Huson*, 78 Cal., 154; *Middleton v. State*, 120 Ind., 166; *Williamson v. Woodman*, 73 Me., 163; *State v. Stark*, 75 Mo., 566; *Mayor v. Harrison*, 30 N. J. L., 73.

In conclusion, it seems to me that the decision of this court in *Shroyer v. Richmond*, 16 Ohio St., 455, is decisive of this case, in more than one aspect of it. That was also an action upon a bond, the bond of a guardian. In that case also the general jurisdiction of the probate court was not attacked, but it was claimed that the appointment was made without authority of law; and in that case also it was claimed that the bond was invalid because the appointment itself was a nullity. On the trial, "to maintain the issues on their part, the defendants offered to prove to the jury, by parol testimony, that at the time of the appointment of Coblenz and Shroyer respectively, as guardians of Long, he was neither a minor, a lunatic, insane person, an

idiot, nor a deaf and dumb person, incapable of taking charge of his affairs; and that there was no testimony offered before the court, at the time of making of either of said appointments, to show that Long was a minor, lunatic, insane person, idiot, or deaf and dumb person, incapable of taking charge of his affairs; and that he was not brought before the court; and that there was no jury summoned by the court, nor inquest held by the jury, nor a jury sworn for that purpose, nor any testimony offered, before a jury or the judge, to show that he was a deaf and dumb person, incapable of taking charge of his affairs; nor any verdict of a jury finding him to be such a person." In other words, the defendants, the sureties on the bond, while conceding that the probate court was the proper tribunal to appoint guardians, just as in this case it is the proper tribunal for the probate of wills and the appointment of executors, yet claimed that the statutes in relation to the appointment of guardians had not been complied with, as it is claimed here. Yet in that case the court held, as already noted in this opinion, that "an order made by a probate court, in the exercise of jurisdiction, cannot be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it." It will be noted that the language of the court is "in the exercise of jurisdiction," not in the *proper* exercise of jurisdiction. It was further held that "in a suit on a guardian's bond, containing a recital of the appointment of such guardian by the proper authority, the obligors are estopped to deny the fact

thus recited, or to question the validity of the appointment." The phrase "the proper authority" in the syllabus, was evidently not intended to limit application of the rule as to estoppel, but was used rather with reference to the facts of the case; for Scott, J., in the opinion says: "This bond recites the appointment of Coblentz, by the proper authority, as guardian of Long. By executing this bond, they obtained for their principal the possession and control of his ward's property, and cannot now be permitted to escape liability to account therefor by denying the recitals of their own bond. They are estopped to do so." Evidently it was in the mind of the court that the obtaining of possession of assets through the medium of a court which had general jurisdiction over the subject-matter, although it may have been improperly, or even unlawfully, exercised, gave color to the alleged appointment of the guardian and aided in the perpetration of a wrong which should be prevented by estoppel. And that in our opinion is precisely the situation in this case.

See also *State v. Piatt*, 15 Ohio, 15, in which it was held that where a clerk of the court of common pleas had been appointed, had given bond and had entered upon the duties of his office, neither he nor his sureties could show that he had failed to qualify by taking the oath of office; and that they will not be permitted to defend themselves upon the ground that he was a mere usurper.

Our conclusion is that, both upon reason and authority, the plaintiffs in error should be estopped from questioning the rights of the defendant in error under the will, and from disputing the validity of the

appointment of Hoffman as executor, and from denying their liability as sureties on the executor's bond. The judgment of the circuit court, reversing the judgment of the court of common pleas, is

Affirmed.

BURKET, SHAUCK and PRICE, JJ., concur.

CALLEN v. THE COLUMBUS EDISON ELECTRIC LIGHT COMPANY.

Title of municipal corporation to streets—Dedicated to public use—Section 2601, Rev. Stat.—Property interest in street of abutting owner—Placing of poles on curb by private lighting company abuse of property rights, when—Section 19 of bill of rights—Lot owner right to injunction, when.

1. The title which a municipal corporation acquires, under Sec. 2601, Rev. Stat., to streets dedicated by a proprietor who subdivides lots for sale, is held for the use of the public for street purposes.
2. An owner of a lot abutting on such street has a property interest in the street in front of his lot which cannot be taken against his will except upon the terms provided by the constitution, viz: that a compensation shall first be made in money or by a deposit of money. *Crawford v. Delaware*, 7 Ohio St., 459; *Railway Co. v. Cumminsville*, 14 Ohio St., 523, and *Railway Co. v. Lawrence*, 38 Ohio St., 41, approved and followed.
3. The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner within the meaning of section 19 of the bill of rights. And such placing of poles, lines and wires is none the less an unauthorized taking even though it be consented to by the city authorities.

66	166
67	190
68	166
68	231

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4. And where it appears that the acts of the lighting company in so placing its poles, lines and wires were done without the knowledge or consent of the lot owner, and that their maintenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance and an order for removal.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Franklin county.

The plaintiff's case was tried in the court of common pleas of Franklin and a judgment rendered in her favor. An appeal was taken by the defendant to the circuit court, where, on trial, judgment was given for defendant, and plaintiff's petition dismissed. She brings error to that judgment.

From the pleadings, the evidence contained in the bill of exceptions, and an agreed statement, the following pertinent facts appear, viz.:

Plaintiff is the owner of lot number nine in Parsons' addition to the city of Columbus, which is situate on the southwest corner of Bryden road and Irvine street, well adapted to residence purposes, and valued at from \$3,500 to \$4,000. It is a vacant lot, fronting forty-three and one-half feet on Bryden road and running south on Irvine street one hundred and sixty-one feet to an alley. Bryden road is paved with an asphalt pavement, and a sidewalk has been constructed in front of the lot on that street. Irvine street has been graded, bouldered and curbed. The curb line on Bryden road is fifteen feet from plaintiff's north lot line and on Irvine street six feet. The proportionate part of the cost of the improvement on both streets has been assessed on plaintiff's lot. All the acts of defendant and of the city of Columbus

hereinafter referred to were done without the knowledge or consent of plaintiff.

A short time prior to the beginning of the suit the city of Columbus had located and maintained a wooden pole ten inches in diameter and twenty-two feet high at the intersection of the curb of Bryden road and Irvine street at the northeast corner of plaintiff's lot. On the pole was a fire alarm telegraph box, and leading from the top thereof were two wires extending south over the curb along the west side of Irvine street, and attached to a pole in the alley south of plaintiff's lot. The box might have been placed on a neat post four feet high, as is done in other parts of the city, or on a pole in the alley at the southeast corner of the lot.

The defendant is a private Ohio corporation, chartered for the purpose of selling and distributing electric energy for the purposes of light and power. On the 18th day of July, 1899, the defendant removed the wooden pole which had been erected by the city and put in its place a pole larger and higher. And on the 22d day of July, 1899, the defendant removed this pole and substituted, near the northeast corner of plaintiff's lot, at the curb, an iron pole eight inches in diameter and forty feet high, on which it strung electric light cable wires diagonally across Bryden road in front of plaintiff's lot to another pole at the intersection of Bryden road and Irvine street, north of Bryden road. On the same day the defendant erected, inside of the west curb on Irvine street, about eighty feet from its intersection with Bryden road, a wooden pole eighteen inches in diameter and fifty feet high, and connected the top of this pole with the top of the iron pole by two electric cable wires. These

poles and wires were placed in the night season, after midnight. In the alley a telephone company has maintained a pole for stretching telephone wires thereon, with which company defendant has a contract for its use for accommodating their wires. It is the intention of the defendant to string along the poles nine electric light cable wires, three about six-eighths of an inch in diameter, three about one-half an inch in diameter, and three about one-fourth, and all about forty feet above the surface of the ground.

By contract with the defendant the city of Columbus has placed its fire alarm box on the said iron pole and has strung its wires in the same manner that they were before the wooden pole was removed.

Defendant has maintained an electric light station at the corner of Gay and Third streets, Columbus, since the year 1887. It has erected in the streets, alleys and highways of the city ten miles of poles.

The defendant has had, from time to time, contracts with the city for lighting market houses, engine houses, the city hall, and some of the streets in the interior of the city, but it is not claimed that any such contract existed as to the neighborhood of Bryden road and Irvine street, nor that any such service was rendered.

Defendant never asked permission to erect the poles, or any of them; never paid or offered to pay plaintiff any compensation or damages, and never acquired a right to erect the poles by appropriation proceedings. Evidence was given at the trial by plaintiff tending to prove that plaintiff's property would be rendered less valuable, if the poles and wires were to be permanently maintained, by an amount from \$800 to \$1,200.

Plaintiff's action was commenced July 22, 1899, immediately upon learning of the acts complained of. The relief sought was a perpetual and mandatory injunction. Defendant defended, by allegation and proof, upon the ground, among others, that the city of Columbus, by proper resolution and ordinances, has given to it the full legal franchise and right to erect and maintain said poles and wires as the same had been by it constructed, and denied that any right of plaintiff had been invaded. This claim was controverted by the plaintiff. The common pleas rendered judgment granting perpetual injunction and commanded the removal of the poles and wires within fifteen days from the entry of judgment, but the circuit court, as before stated, refused plaintiff any relief.

Mr. G. J. Marriott, for plaintiff in error, cited the following authorities:

Railway Co. v. Lawrence, 38 Ohio St., 41; *Railway Co. v. Cummins*, 14 Ohio St., 523; *Pierce on Railroads*, 241; *Railway Co. v. Robbins*, 35 Ohio St., 531; *Railway Co. v. O'Harra*, 48 Ohio St., 343; *Railway Co. v. Williams*, 35 Ohio St., 168; *Railway Co. v. Winslow*, 2 Circ. Dec., 240; 3 C. C. R., 425; *Cohen v. Cleveland*, 43 Ohio St., 190; *Rhodes v. Cleveland*, 10 Ohio, 159; *McComb v. Akron*, 15 Ohio, 479; *McCombs v. Akron*, 18 Ohio, 51; *Crawford v. Delaware*, 7 Ohio St., 459; *Keating v. Cincinnati*, 38 Ohio St., 141; *Railroad Co. v. Naylor*, 2 Ohio St., 235; *Richards v. Cincinnati*, 31 Ohio St., 506; *Story v. Railway Co.*, 90 N. Y., 122; *Jackson v. Jackson*, 16 Ohio St., 163; *Hatch v. Railroad Co.*, 18 Ohio St., 92; *Ryan v. Cincinnati*, 1 Circ. Dec., 311; 1 C. C. R.,

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558; *Smith v. Commissioners*, 50 Ohio St., 628; *Smith v. Telegraph Co.*, 1 Circ. Dec., 475; 2 C. C. R., 259; *Daily v. State*, 51 Ohio St., 348; *Taggart v. Railway Co.*, 16 R. I., 668; *Willis v. Telegraph & Tel. Co.*, 34 N. W. Rep., 337; *Blanchard v. Telegraph Co.*, 60 N. Y., 510; *Story v. Railroad Co.*, 90 N. Y., 122; *Sheldon v. Telegraph Co.*, 51 Hun, 591; *Tuttle v. Electric Co.*, 50 N. Y., Sup. Ct., 464; *Telegraph Co. v. Lead Co.*, 50 N. Y. Sup. Ct., 488; Cooley's Const. Lim., Sec. 688; Mills on Eminent Domain, Sec. 205; *Pierce v. Drew*, 136 Mass., 75; *Building Association v. Telegraph Co.*, 88 Mo., 258; Lewis Eminent Domain, Sec. 131; *Halsey v. Rapid Transit Co.*, 20 Atl. Rep., 859; *Dillon Munic. Corp.*, Secs. 698, 698a; *Telegraph Co. v. Williams*, 11 S. E. Rep., 106; *Clement v. Cincinnati*, 9 Re., 688; 16 W. L. B., 355; *Hunchman v. Railroad Co.*, 17 N. J. Eq., 75; *Halsey v. Railway Co.*, 20 Atl. Rep., 859; *Telegraph Co. v. Barnett*, 107 Ill., 507; *Telephone Co. v. Mackenzie*, 74 Md., 36; *Stowers v. Cable Co.*, 68 Miss., 559; *Broome v. Telephone Co.*, 42 N. J. Eq., 141; *Eels v. Telephone Co.*, 65 Hun, 516; *Blashfield v. Telephone Co.*, 71 Hun, 532; *Dusenbury v. Telephone Co.*, 11 Abb. N. Cas., 440; *Telephone Co. v. Lead Co.*, 67 How. Pr., 365; *Prentiss v. Telephone Co.*, 1 Dec., 97; 32 W. L. B., 13; *McLean v. Electric Light Co.*, 8 Re., 619; 9 W. L. B., 65; *State v. Traction Co.*, 10 Circ. Dec., 212; 18 C. C. R., 490; *Johnson v. Electric Light Co.*, 54 Hun, 469; *Magee v. Overshimer*, 150 Ind., 127; *Pierce v. Drew*, 136 Mass., 75; *People v. Eaton*, 100 Mich., 208; *Nichol v. Telephone Co.*, 62 N. J. L., 155; *Palmer v. Electric Co.*, 158 N. Y., 231; *Carpenter v. Electric Co.*, 43 L. R. A., 645; *Electric Light Co. v. Hart*, 1 Pa. Dist. Rep., 571; *Tiffany v. Illuminating Co.*, 51 N. Y. Sup.,

(19 Jones & S.), 280; Croswell on Electricity, Sec. 126; *Nicol v. Telephone Co.*, 42 Atl. Rep., 583; *Telegraph Co. v. Jones*, 78 Ill. App., 372; *Cable Co. v. Eaton*, 170 Ill., 513; Lewis on Eminent Domain, Par. 638; 1 Sutherland on Damages, 142; *Stevenson v. Morris*, 37 Ohio St., 10.

Mr. Paul Jones, for defendant in error, cited the following authorities:

State v. Traction Co., 10 Circ. Dec., 212; 18 C. C. R., 490; *McCormick v. District of Columbia*, 54 Am. Rep., 284; *Pierce v. Drew*, 136 Mass., 75; *People v. Eaton*, 100 Mich., 208; *Nicoll v. Telephone Co.*, 62 N. J. L., 156; *Cater v. Telephone Exchange Co.*, 60 Minn., 539; *Irwin v. Telephone Co.*, 37 La., 63; *Building Association v. Telephone Co.*, 88 Mo., 258; *Railway Co. v. Lawrence*, 38 Ohio St., 41; *Magee v. Overshiner*, 150 Ind., 127.

SPEAR, J. The determination of the rights of the parties in this case involves an inquiry respecting the interest which the owner of land abutting on the streets of a municipality has in those streets. As to country highways it seems to be settled in this state that while the public has the right of improvement and uninterrupted travel, the abutting owner has the right to all uses of the land not inconsistent with this right of travel and improvement. The subject is considered anew as to such highways in the case of *Schaaf v. C. M. & S. Elec. Ry. Co.*, 66 Ohio St., 215, reported contemporaneously with this case, where it is held in substance that an interurban railroad on the side of a country highway, to be constructed and operated in the manner therein described, is an additional burden and an interference with the right

of the owner of abutting lands, and that such owner is entitled to an injunction to prevent the construction until such right has been legally appropriated; and it is unnecessary to do more here than to refer to that case. It is, however, insisted that even if it be conceded that, as to country highways, the abutter is the owner of the fee to the middle of the road, and therefore has peculiar rights therein, yet rules applicable to such a situation will not apply to the case of city streets, where, under the statute, the fee is in the city. No special finding appears in the record as to the dedication of Bryden road and Irvine street, but it is presumed that Parsons' addition was platted and recorded in accordance with the statute. The statutory provision respecting the effect of such dedication is found in section 2601, Revised Statutes, and is a substantial reproduction of the provision of section four of the act of March 3, 1831, S. & C., 1483. It is as follows: "And thereupon the map or plat so recorded shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended." It seems plain that the effect of the provision is not to vest in the municipality a fee simple absolute in the streets, but only a determinable or qualified fee, and that what is granted to the city is to be held in trust for the uses intended, viz.: for street uses, and street uses only. Such title would be adequate to clothe the municipality with power to fully perform its statutory duty toward such streets, viz.: to keep the same open, in

repair, and free from nuisance, and for all incidental street purposes. The limitation upon the title necessarily implies that there is a substantial interest not conveyed. Naturally it would be presumed that the right of reverter would remain either in the original proprietor, or would pass to and vest in the owners of the abutting lots. That, as between these two classes, the interest is in the owner of the abutting lots, was held by this court in *Stephens v. Taylor, Exr.*, 51 Ohio St., 593, where a street had been vacated by the city and the question presented was whether the fee reverted to the heirs of the original owner who dedicated the street, or to the owners at the time of the vacation of the lands abutting. No report of the case was made by this court, but it will be found fully reported by the circuit court, opinion by Shearer, J., in 6 C. C. R., 142. The same principle is announced in *The Kinnear Mfg. Co. v. Beatty*, 65 Ohio St., 264. That this interest is a private right of the nature of an incorporeal hereditament legally attached to the contiguous grounds and the erections thereon, has been so frequently held by this court that extended repetition would not be a justifiable use of space. It suffices to refer to *Crawford v. Delaware*, 7 Ohio St., 459, 469; *Street Ry. Co. v. Cumminsville*, 14 Ohio St., 523; *Railway Co. v. Lawrence*, 38 Ohio St., 41. It would seem to follow from the foregoing that, for practical purposes, there is no substantial difference in the right of the owner of lands abutting upon a country highway in such highway and that of the owner of a lot abutting on a city street in such street. In the one case, where the fee is in the landowner his rights in and over the streets are in their nature legal, while if the fee be in the public, the lawful

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rights of the abutting owners are in their nature equitable easements. In both situations the right of the public is for road or street purposes, and is necessarily limited to such control as is necessary to accomplish those purposes. As to country highways that object is accomplished ordinarily by securing free passage for travel and reasonable maintenance and repair, while as to city streets the necessary uses and consequent control is the same, viz.: for street purposes. The question has been a subject of much contention and of contrary decisions, but the conclusion above stated is, we think, supported by the better reason as it is by abundant authority.* See *Dillon's Munic. Corp.*, Secs. 656a, 656b and 664a; *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y., 122; *Lahr v. Met. Elec. Ry. Co.*, 104 N. Y., 268, and authorities there cited; also *Barney v. Keokuk*, 94 U. S., 324; and *Railway Co. v. Lawrence*, *supra*.

It would be idle now to discuss at length the character of this right of the owner of abutting land in the street. By repeated adjudications it is declared to be a right which attaches to his property, and, as expressed by Swan, J., in the Delaware case, *supra*, and quoted by Ranney, J., in the Cumminsville case, *supra*, and by White, J., in the Lawrence case, *supra*, is "as much property as the lot itself." And if, as held by these adjudications, the owner's right in the street is to be treated as property, the only remaining question is whether or not the acts of the defendant complained of constitute, in an essential degree, a taking of that property within the meaning of the constitution. And here we inquire what is meant by the word "property?" If, as was once understood, and is still understood by some, it means only a corporeal

thing, as a horse or a piece of land, then a negative answer to the question would seem to follow. If, however, the true meaning is the right of property in and dominion over the specific thing, then we would seem to be led to a different answer. That the latter meaning is the true one appears now to be the settled doctrine. Under this definition the word "property" is held to denote certain rights in things which pertain to persons and which are created and sanctioned by law. They are, as stated by one writer, "the right of user, the right of exclusion and the right of disposition * * *. A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof in such manner as is not inconsistent with law." Lewis on Eminent Domain, section 54, and authorities cited. As put by Shaw, C. J., in *Railroad v. Plymouth*, 14 Gray, 161; "The word 'property' in the tenth section of the bill of rights, which provides that whenever the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor, should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such." And that this is the meaning intended by the previous adjudications of this court which have been cited, we think there can be no reasonable doubt.

Coming now to the question of taking, it is to be admitted that it has been held necessary to the idea of a taking that there must be an exclusive appropriation, a physical, tangible appropriation of the property of another, a taking the property altogether. This is the doctrine announced in *Hurt v. Atlanta*,

100 Ga., 274, and some other cases. But the rule more frequently held, and, we think, the more enlightened rule, is that this limitation of the term "taking" to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property, for, if the right of user is an essential element of ownership, then whatever physical interference annuls this right takes property. See Lewis on Em. Dom., *supra*, Sec. 58; *Pearshall v. Supervisors*, 74 Mich., 558; *Grand Rapids, Bg. Co. v. Jarvis*, 30 Mich., 308; *Eaton v. B. C. & M. R. R.*, 51 N. H., 504; *Thompson v. The River Co.*, 54 N. H., 545; *Arimond v. Canal Co.*, 31 Wis., 316. The doctrine is not better stated than by the Supreme Court of the United States, opinion by Mr. Justice Miller, *Pumpelly v. Green Bay Co.*, 80 U. S. (13 Wall.), 166, in discussing the law of eminent domain: "The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such a serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution."

And when we hold, as we do, that the property interest which is here defined is protected by the constitution, article one, section nineteen, which pro-

vides that private property shall ever be held inviolate, and when taken for public use, except in time of war or other public exigency, compensation therefor shall first be made in money or first secured by a deposit of money, as well as by section five of article thirteen, which provides that: "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money," etc., we but follow the law as laid down by our predecessors in the cases cited and followed in many adjudications in more recent years. And if the owner's right in the street be property, as hereinbefore defined, and as such is protected by the constitution, it inevitably follows that the attempt by a private corporation, in order to accomplish its own private business purposes, to invade that right by placing in the street in front of the lot permanent erections which will, in any appreciable degree, impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking; it is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all as against the will of the owner, it must be upon the terms prescribed by the constitution. To the Ohio decisions already cited may be added as bearing generally on the subject: *Railway Co. v. Tel. Assn.*, 48 Ohio St., 390; *Railway Co. v. Campbell*, 51 Ohio St., 328; *Daily v. State*, 51 Ohio St., 348; *Kramer v. Railway Co.*, 53 Ohio St., 436. Also *Craig v. Railway Co.*, 39 N. Y., 404; *Dillon's Munic. Corp.*, Sec. 698a; *Backus v. Detroit*, 49 Mich., 110; *Pierce on Railroads*, 241; *Broome v. N. Y.*

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& *N. J. Tel. Co.*, 42 N. J. Eq., 141; *Palmer v. Larch Mont. Elec. Co.*, 158 N. Y., 231; *Carpenter v. Cap. Elec. Co.*, 178 Ill., 129; *Haverford Elec. Light Co. v. Hart*, 1 Pa. Dist. Rep., 571; *Tiffany v. U. S. Ill. Co.*, 51 N. Y. Sup., 280; *Croswell's Electricity*, Sec. 126, and *Lewis' Em. Domain*, Sec. 131.

Nor can it avail defendant that the city of Columbus has given consent to its use of these streets—and we do not undertake to determine here whether such consent has or not been legally given—for the city has and can have no power to legalize or sanction such taking. The electric lighting by defendant is not of the streets and for the city; it is wholly for private use; hence it is a private purpose and is not a street purpose in any aspect of it. Its use of these streets is not such as was contemplated by the original dedication. On the contrary, the maintenance of its structures devolves new burdens upon the land, burdens calculated to materially impair the rights of the owner in the street. The plaintiff's evidence tends to show that the impairment of the value of plaintiff's lot would be serious, and no evidence was offered by defendant to the contrary. If the company has the right to plant two poles, with nine electric lines or wires, it has by the same authority, the right to plant twenty poles with ninety wires. It is a question of right, and right only. We are not required to determine whether the impairment will be much or little. If it is appreciable in character and amount, the plaintiff is entitled to relief.

Nor is the defendant's contention aided by its contract with the city for the placing of the fire alarm box upon its iron pole. The finding shows that such pole is not necessary for the city's use, and that a post

much less objectionable in character, or a pole maintained at a point where it would be likely to cause less obstruction to access, would serve the city just as well. It is to be borne in mind that the city's control of the streets is confined to street purposes, and is not for general municipal purposes. The distinction is obvious. The primary object of highways is for public travel. As expressed by Dickman, J., in *Railway Co. v. Tel. Assn.*, *supra*, "the primary and dominant purpose of their establishment was to facilitate travel and transportation." Whatever is a necessary incident to that use, the city may provide. Sewers, for instance, drain the surface water and thus relieve the streets from impairment and destruction, and in this respect sewers are for a street purpose; while, in addition, they may drain abutting property, thus tending to promote the public health, and in this respect they serve a municipal purpose. The same may be said as to water supply for cleansing and sprinkling the streets, and by owners of property abutting for cleaning and domestic uses, and for the extinguishment of fires. Light, also, is necessary for street purposes, and is convenient for the use of citizens, thus serving two uses, one a street purpose and the other a municipal purpose. But a fire alarm apparatus is strictly a municipal convenience; it does not enter necessarily into the control of streets. So it would seem that the city's right to maintain a pole for fire alarm purposes may not be entirely clear, although we are not called upon in this case to pass upon that question, and do not undertake to do so.

The right of the abutting owner to the unimpaired use of the street and to be compensated for new and additional burdens imposed by diversion of the street

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to new uses, is recognized and enforced by a number of sections of our Revised Statutes which, without quoting their provisions, are here cited for reference, viz.: Sections 3456, 3457 and 6448. They are cited only as showing a legislative purpose to conserve the rights of abutting owners.

From the foregoing it results that the conclusion of law found by the circuit court is an erroneous one; that the holding of the common pleas is, under the admitted facts, the true rule, and that the plaintiff is entitled to the remedy accorded by the latter court. A judgment for plaintiff will, therefore, be entered here perpetually enjoining the maintenance of the poles and wires complained of and a mandatory injunction ordered requiring their removal.

Judgment accordingly.

WILLIAMS, C. J., BURKET, DAVIS and PRICE, JJ.,
concur.

THE STATE OF OHIO v. THE CINCINNATI TIN & JAPAN COMPANY.

Record of action to be a bar or res adjudicata—Must show that the party sought was party to the former action—To estop state, record must appear that the state authorized the previous action—Action by state to recover canal lands—State may introduce in evidence specifications of canals, but not epitome of specifications—Section 218-223, Bates' Statutes—Attempting to make maps, etc., prima facie evidence, unconstitutional and void, when—Application of section 19 of the bill of rights and section 23 of article 2 of the constitution—State to recover canal lands must prove former ownership—Law of incompetent evidence—Party having title demises to another party—First party cannot maintain action against third party to recover, when.

1. To constitute the record of an action a bar or *res adjudicata* it must appear in the record itself that the party against whom it is offered was a party or privy in blood or estate to the former action, or assisted in the prosecution or defense thereof for some benefit of his own.
2. For a record of a previous action to which the state was not a party to be available against the state as an estoppel, it must appear that the state by statute expressly authorized the action to be brought or defended, that the officer having the action in charge acted within the scope of such authority, and in no event can the estoppel be broader than the authority so given by statute. In such cases the estoppel is by statute rather than *in pais*.
3. In an action by the state for the recovery of canal lands, it is proper for the state to introduce in evidence the specifications and rules for the construction of the canals, so as to show the dimensions of the canals and banks, but an epitome of such specifications and rules prepared by the canal commission is not competent evidence.
4. Section 218-223, Bates' Statutes, in so far as it attempts to make the findings, maps, plats, and surveys prepared by the canal commission competent or *prima facie* evidence of the truth of such findings, or the boundaries of such lands, or that the state has the ownership of such lands, or an in-

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terest therein, is unconstitutional and void, being in conflict with section 19 of the bill of rights, and section 28 of article 2 of the constitution.

5. In an action by the state for the recovery of canal lands, the state must first prove by competent evidence that the lands in question were formerly part of the canal system of the state, and then the burden shifts to the defendant to show that he has in some lawful manner acquired title from the state.
6. Where a plaintiff fails to introduce any evidence tending to prove his cause of action, and the defendant introduces incompetent evidence over the objection of the plaintiff, the introduction of such evidence is no ground for reversing the judgment, because the judgment is properly founded upon the failure of proof, unaided by the incompetent evidence.
7. Where a party having title to lands, demises them with possession for a term of years to another party, such first party cannot maintain an action against a third party for the recovery of possession of such lands, while such demise is outstanding.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Hamilton county.

This was an action in the court of common pleas by the state to recover possession of what is known as "Lockport Basin" in Cincinnati, the claim by the state being that the basin was formerly part of the canal system of the state.

The defendant denied that the basin had ever been part of the canal system of the state, and plead as an estoppel the record of a judgment in the superior court of Cincinnati in Canal Elevator and Warehouse Company, the assignees of a lease from the state to Brown & Wood for ninety-nine years renewable forever, against Buckingham & Mathers, the predecessors in title to the Cincinnati Tin & Japan Company, which action was commenced by the Warehouse Company as the lessee of the state for the re-

covery of this same basin on January 20, 1872, and final judgment rendered in favor of the defendants in that case on November 18, 1876. It is averred in the answer of the Japan Company that the Warehouse Company commenced that action upon the advice and procurement, and with the assistance, of the state, that the Warehouse Company claimed title under its lease from the state, which title was denied, and title averred to be in the defendants in that case. In the final judgment the court found in that case that the plaintiff, the Warehouse Company, "is not entitled to the possession of the premises, but that the defendant is seized in fee simple thereof, and entitled to retain possession thereof." The judgment is "that the plaintiff's petition be dismissed, that the title of the defendant to said premises be quieted against the claim of the plaintiff to any interest or estate therein, that the plaintiff be enjoined perpetually and forever restrained from disturbing or interfering with the defendant's possession thereof."

On the trial of the case at bar the Japan Company offered in evidence an appropriation by the general assembly May 5, 1869, as follows:

"To pay attorneys' fees and incidental expenses of the board of public works, to include fees and costs of maintaining title of the state to the lands in the city of Cincinnati which have been leased to Thomas Brown and Adolph Wood, two thousand dollars."

The reports of the board of public works as to the progress of the action were also introduced in evidence, the one for 1881 showing that the case had been decided adverse to the state. There was also offered in evidence the appropriation of February 27, 1880, as follows:

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"To pay A. Taft & Sons attorneys' fees for services rendered and expenses from 1873-1877, inclusive, in recovering land in Cincinnati, twelve hundred dollars (\$1,200)."

The state, upon the trial, objected to the introduction of said record in evidence, but the court overruled the objection, to which the state excepted.

The state, upon the trial, offered in evidence the maps, plats, surveys and findings made by the canal commission under and by virtue of section 218-223, Bates' Statutes, and the same were excluded upon objection of the defendant below.

The state, upon the trial, offered in evidence an epitome of the rules and specifications under which the canals were originally constructed, for the purpose of showing the width and dimensions of the berme banks. Upon objection being made the court excluded the evidence and the state excepted.

The jury found in favor of the defendant. A motion for a new trial was filed and overruled, exceptions taken, and judgment rendered on the verdict. The circuit court affirmed the judgment. Thereupon the state came here seeking to reverse the judgments of the courts below.

Mr. John M. Sheets, attorney general; *Mr. Smith W. Bennett* and *Mr. John E. Todd*, for plaintiff in error.

This action was instituted in the court of common pleas in and for Hamilton county, Ohio, by the state of Ohio as plaintiff filing therein its petition in ejectment in which it claimed it was the owner of certain lands therein described, being part of the Miami and Erie canal and known as "Lockport Basin;" that the

defendant unlawfully keeps the plaintiff out of possession of the same and ending with a prayer for possession of the premises.

The defendant answers in three separate defenses.

1. Admission of corporate capacity and denial that plaintiff has a legal estate in or is entitled to immediate possession of the premises and denies that the defendant unlawfully keeps it out of possession.

2. Pleads the record in a cause in the superior court of Cincinnati entitled *The Cincinnati Elevator and Warehouse Company v. E. Jefferson Buckingham and Richard Mathers*, partners as *Buckingham & Mathers*, in which it was averred that the judgment of the court was against the plaintiff and in favor of *Buckingham and Mathers*. That the plaintiff in that action was the lessee of the state of Ohio and that the action was brought with the assistance of the state of Ohio and under its advice and procurement, and that the judgment in that cause is still in full force and effect, and that the plaintiff herein by reason of the judgment aforesaid is estopped from prosecuting this action.

3. The third defense relied upon is uninterrupted possession for a period of more than twenty-one years.

To this answer the state filed a reply denying each and every allegation of the second defense except that the *Cincinnati Elevator and Warehouse Company* was the lessee of the state of Ohio. It further replies and says that if there was any such judgment rendered against the *Cincinnati Elevator and Warehouse Company*, the same is not binding upon the state of Ohio because it was not a party to said action, and the action was begun without its knowledge and it was not represented by counsel or in any way a

party to the record, and denies that the same is any adjudication of the title of the state of Ohio in the premises, or that the record therein does in any way estop the plaintiff in this action.

The balance of the reply is in the nature of a demurrer challenging the answer as not sufficient in law to constitute a defense to the petition.

The state of Ohio prosecutes error to this court seeking the reversal of the judgment of affirmance by the circuit court.

Is statute unconstitutional under which evidence was offered?

In holding that Sec. 218-223 of the Revised Statutes is unconstitutional.

Upon the trial of this cause in the court below, the plaintiff in error offered in evidence certain maps, plats, findings and parts of public documents of the canal commission, the board of public works and chief engineer, all of which were duly certified, and which the court refused to be admitted as evidence for the state. To the ruling of the court exceptions were noted by the state.

This evidence was introduced by virtue of Sec. 218-223, Bates' Annotated Revised Statutes. The court in passing upon the admissibility of the evidence thus offered by the state, held that that section was unconstitutional and hence refused to permit the evidence to be introduced.

In this we claim that the trial court erred.

The court's objection to the statute was that the statute created a *prima facie* case for the plaintiff, by permitting the maps and plats to be thus introduced.

We did not think that any objection could be made to this character of testimony, if properly certified.

The holding of the courts have been uniform on that question. Cooley on Constitutional Limitations (6 ed.), p. 450.

The court in passing upon the objection made by defendant's counsel to the evidence in question, seemed to think that it gave the state of Ohio an unjust advantage in the controversy; and seemed to rule as if under the impression that the statute made the plats, maps and findings *conclusive* evidence instead of *prima facie*. The statute says that such plats, maps and findings "shall be taken and held to be competent *prima facie* evidence of the truth of such findings," etc. It is *conclusive* evidence of no one fact in the case. If so, we would not attempt to sustain so unjust a law.

We are not without authoritative expressions from our own Supreme Court upon the validity of similar laws. *Pennsylvania Company v. McCann*, 54 Ohio St., 10; *Railway Co. v. Kreager*, 61 Ohio St., 312.

Similar Statutes in Ohio.

Section 2859. Making the tax duplicate *prima facie* evidence, on a trial for collection of taxes, of the amount and validity of such taxes.

Section 2877. Making auditor's deed *prima facie* evidence of a good and valid title in the grantor, his heirs and assigns.

Section 2908. Similar to above.

Section 1176. Providing for the record of a copy of field notes of the corners and bearing trees to each section, etc., of land; and making a certified copy from such book *prima facie* evidence when the original would be received.

Section 4143-12. Providing for the record of papers of the Connecticut Land Co.; that a certified

copy thereof shall be *prima facie* evidence of the existence of such paper.

Section 4143-13-14. Providing that the commissioners of Fulton county may purchase an abstract of titles from one E. L. Barbor; and that such abstract, etc., shall be taken and held to be *prima facie* evidence in all questions of title relating thereto.

Section 3233-3. Providing that a religious society, claiming to be incorporated, and performing the duties of a corporation for thirty years, shall be *prima facie* evidence of the issue of such charter as claimed by such society.

Section 5339b. Providing for making restored record evidence of burned or destroyed record.

Section 6389. Providing what shall be *sufficient evidence of marriage*.

Section 6388. Providing that a copy of the record of a minister's name, duly recorded, shall be *good evidence* that the minister was authorized to solemnize marriages.

Section 6399. Providing that a copy of the entries, from the record of birth and deaths, duly certified, shall be received in all courts and places as *prima facie* evidence of the facts therein stated.

Section 5862. Providing that the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of a will.

Section 5245. Copies of papers, books and records generally made *competent* evidence.

In addition to the above sections of the statutes, about thirty additional sections could be cited, all of which are similar in their effect, to the section under consideration. They all depend upon the same general proposition for their validity, viz.: that rules of

evidence are not rules of property; and that the legislature has full control over all such rules, and violates no constitutional provision in enacting them, if in so doing it merely defines a *prima facie* case, or changes the burden of proof from one party to the other. *Hand v. Ballou*, 12 N. Y., 541; *Hickox v. Tallman*, 38 Barb., 612; *Pratt v. Jones*, 25 Vt., 303; Blackwell on Tax Titles, 100; Sedgwick on Const. and St. Law, 351; *Allen v. Armstrong*, 16 Ia., 508; *Amberg v. Rogers*, 9 Mich., 332.

The legislature may determine which party shall have the burden of proof and that any evidence however slight shall make a *prima facie* case. *State v. Cunningham*, 25 Conn., 195; *State v. Morgan*, 40 Conn., 44; *Wooten v. State*, 24 Fla., 335; *Edwards v. State*, 121 Ind., 450; *State v. Hurley*, 54 Me., 562; *Commonwealth v. Rowe*, 14 Gray (Mass.), 47; *Commonwealth v. Curran*, 199 Mass., 206; *Howard v. Moot*, 64 N. Y., 262; *Auburn v. Merchant*, 103 N. Y., 143; 57 Am. Rep., 705; *State v. Mellor*, 13 R. I., 666; *Lincoln v. Smith*, 27 Vt., 328; *Delaplaine v. Cook*, 7 Wis., 44.

The legislature of a state has the power by statute to provide that certain circumstances shall constitute *prima facie* evidence of the facts in issue. The law of evidence, being a part of the remedy, is within legislative control. *Von Hoffman v. Quincy*, 71 U. S. (4 Wall.), 535; *Mason v. Haile*, 25 U. S. (12 Wheat.), 370; *Rathbone v. Bradford*, 1 Ala., 312; *Richmond & D. R. Co. v. Mitchell*, 92 Ga., 77; *Holland v. Dickerson*, 41 Ia., 367; *Hays v. Armstrong*, 7 Ohio (pt. 1), 247; *Parker v. Sterling*, 10 Ohio, 357; *Lewis v. McElvain*, 16 Ohio, 347; *Goshorn v. Purcell*, 11 Ohio St., 641; *Pennsylvania Co. v. McCann*, 54 Ohio St., 10;

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Long's Appeal, 87 Pa. St., 114; *Vanzant v. Waddel*, 2 Yerg. (10 Tenn.), 259.

This testimony was permitted by the court to be introduced upon the theory, that, as the second defense in the answer sets forth, the action of the *Cincinnati Elevator and Warehouse Company v. Buckingham & Mathers*, was in fact carried on and prosecuted—"upon the advice and procurement and with the assistance of the plaintiff's herein," and having been so carried on and prosecuted, it became and was in law *an action by the state of Ohio*.

It will be observed that the evidence shows: (a) The State of Ohio was not a party to said action. (b) The judgment rendered therein was against the Cincinnati Elevator and Warehouse Company, and not against the state of Ohio. (c) The Cincinnati Elevator and Warehouse Company was only the lessee of the state of Ohio, and the judgment rendered was merely the adjudication of its rights as lessee, and not an adjudication of the interests, rights and title of the state.

It was not possible to sue the state of Ohio without its consent first having been given. *Board of Liquidation v. McComb*, 92 U. S., 531; *Nathan v. Virginia*, (1 U. S.) (1 Dall.), 77n; *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.), 257; *Curran v. Arkansas*, 56 U. S. (15 How.), 304; *Beers v. Arkansas*, 61 U. S. (20 How.), 527; *Railroad Co. v. Tennessee*, 101 U. S., 337; *Cunningham v. Railroad Co.*, 109 U. S., 446.

If a state cannot be sued directly, it could not be indirectly. If a judgment could not be rendered against a state without its consent having been given to be sued, the state could not be affected by a judgment rendered against the state's lessee.

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A state cannot be bound by a judgment rendered against its own officers. *Davis v. Gray*, 83 U. S. (16 Wall.), 203; *Carr v. United States*, 98 U. S., 433.

It is not necessary to cite authorities to show that the privileges of the state and its rights as a sovereign, are as great as are those of the general government secured to itself.

How could it then be dispossessed of its interest in real estate by a judgment against its lessee?

It will be observed by reading the judgment of the Cincinnati superior court in *Canal Elevator Co. v. Buckingham et al.*, that the judgment is only operative upon the plaintiff and the state of Ohio cannot by any reasoning be made to mean the same person. If the judgment of the court is against John Doe individually, it cannot be extended to Richard Roe unless he claims under Doe. *State v. Gas Light & Coke Co.*, 18 Ohio St., 262.

The Canal Elevator and Warehouse Company in the case above mentioned was the tenant of the state by virtue of the powers vested in the board of public works of the state to execute such leases, but the power to lease did not confer the power to sell or give away the premises in question. This was a board of limited powers. They had no right or authority to enter the appearance of the state of Ohio in any action. We cannot see how by any fiction a judgment recovered against the lessee could even be construed to be a judgment against the board of public works, let alone that it would be a judgment, and effectual as a bar, against the state of Ohio.

If the defendant, the Cincinnati Tin & Japan Company, claimed through Buckingham and Mather, or in other words, if they were a link in their chain of

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title, the judgment rendered in that case, *if against the state, or its grantors*, might be used by the defendant in proving its ownership to the land in question.

But that is not the question here. The objection is twofold: (a) To using the evidence upon which the judgment was rendered. In presenting this objection we waive for the moment the fact that the state of Ohio, or its grantors, was not a party to that cause. But suppose they were. It could only be the record, viz.: *the judgment*, that could avail the defendant, the Cincinnati Tin & Japan Company, *and not the evidence* upon which the judgment was based. The judgment concludes the parties and privies. But here is a privy to that judgment refusing to be satisfied with it, and going back of it introduces the evidence again, as much as to say, that it would again submit to the jury in this cause the evidence in the trial thirty years before, and have them return a new verdict thereon. (b) The further objection we make to this class of testimony is that the judgment is no bar to an action instituted *by the state of Ohio* for the same premises. Not being able to use the same as a bar or estoppel, the evidence was improper for any purpose. It would not even avail as between individuals, and *a fortiori*, cannot avail as against the state. *Bennett v. Leach*, 25 Hun (N. Y.), 178.

It was not evidence against the state. *Ainslie v. Mayor*, 1 Barb., 168; *Thompson v. Clark*, 4 Hun, 164; *Leland v. Tousey*, 6 Hill (N. Y.), 328; *Sheridan v. Andrews*, 49 N. Y., 478; *Masten v. Olcott*, 101 N. Y., 152; *Kent v. Lasley*, 48 Wis., 257; *Bates v. Smith*, 5 Sneed, 105; *Stout v. Taul*, 71 Tex., 438; *Orthwein v. Thomas*, 13 N. E. Rep., 564; *Smyth v. Gayle*, 58 Ala., 600; *Bresh v. Cook*, Brayt. (Vt.), 89;

Samuel v. Dinkins, 12 Rich. (S. C.), 172; 75 Am. Dec., 729; *Harkness v. Corning*, 24 Ohio St., 416.

Mr. H. D. Peck and *Mr. William Worthington*, for defendant in error.

Both parties claim title under the Bank of the United States, which, at one time, owned the property in question, and which is within the lines of a subdivision of lands made by the bank.

Defendant offered a series of conveyances claiming to have derived title through them from the bank of the United States; and further called a witness who testified in substance that he had made an examination of all the records in the office of the board of public works and canal commissioners of the state of Ohio, and, that he had found nothing showing an appropriation of the land in question or any proceedings to appropriate it, or any proceedings, orders or contracts relating to the construction of a basin at that point, or any award of damages allowed or refused; and also the testimony of Col. Samuel Bachtell, assistant engineer of the public works of the state of Ohio, to the effect that he was familiar with the records of the board, and that all the existing records pertaining to the construction and maintenance of the Miami and Erie canal were kept in the custody of the board; that he had made a search for any plat or plan of the portion of the canal within the city of Cincinnati known as "Lockport Basin," but had found no plat earlier than one made in the year 1851, except copies of the plats for the United States Bank subdivision certified from the records of Hamilton county.

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The basin was constructed immediately after the construction of the canal at that point, and was in use as early as 1832. The state not only has no record of appropriation, but there is nothing of any sort showing any plan for a basin or any specifications or contract for the same, or any illusion of any sort to such a basin in the records of the board of public works or canal commissioners prior to the year 1851; so that the state's claim of an appropriation of the property, leaving out of view the finding of the canal commission excluded from the testimony, rests upon the solitary testimony of the two navigators aforesaid, viz.: that they had seen canal boats pass through the basin, had seen them landed and lying at the warehouses abutting upon it, and had seen them winded, or turned, in the basin. It is extremely doubtful if those facts alone constitute a *prima facie* case of appropriation by the state. *Smith v. State*, 59 Ohio St., 278; *Miller v. Weisenberger*, 61 Ohio St., 561.

When we take the scanty testimony offered by the state of the user and occupation in connection with the testimony offered by defendant, it will appear that the same conclusion must follow as that which was arrived at by this court in the *Smith* and *Weisenberger* cases, and for the same reason. While it is true that boats may have turned in this basin when it existed, it is also true that there was no necessity for the basin for that purpose, for boats are now daily turned at that part of the canal.

The only commission whose plats and findings are made evidence *per se* by Sec. 218-223, Rev. Stat., was the original commission appointed under the act of 1888; the language making such documents evidence is limited in terms to the findings, maps, plats

and surveys of that commission, and has never by any subsequent statute been extended to those of any other commission. The documents offered in evidence here were none of them made under the authority of that commission, as appears by their dates; for the authority of that commission ceased in 1890, and the earliest of these documents bears date in 1896. Therefore, Section 218-223 does not warrant the admission of any of them.

Section 79, Revised Statutes, precludes giving Section 218-223, retrospective operation.

The court below held, and we submit correctly, that assuming that Sec. 218-223, Rev. Stat., was applicable to the plats and findings of subsequently created commissions, and were intended to make documents such as these admissible in evidence at all, it could not be construed, in view of Sec. 79, Rev. Stat., as intending that they should be received in evidence with reference to a cause of action existing on April 12, 1889, when this provision giving evidential effect to proceedings of the canal commission was first introduced into the statutes.

It can not be denied that this provision relates at least to the *remedy*. We think, for reasons subsequently to be stated, that it goes farther and affects the *right* as well; but for the purpose of the question immediately under consideration this contention need not be urged. Counsel for the state justify their argument as to the admissibility of these documents as evidence upon the assumption that the remedy only is affected, and that such effect does not transcend the power of the legislature. Were this true it would not follow that the legislature intended that existing causes of action should be remedied under this new

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rule. The act in question, 86 O. L., 270-274, contains no clause explicitly declaring that it shall control existing causes of action. It does indeed say that "this act shall take effect and be in full force from and after its passage;" but it has been repeatedly held by this court that this declaration is not sufficient to give a remedial act a retrospective operation, and that the intent to give it such effect must appear either explicitly, as in the act of April 25, 1898, amending Sec. 6710, 93 O. L., 255, or by implicit expression so plain and forcible that he who runs may read. *State v. Rabbitts*, 46 Ohio St., 178; *Insurance Co. v. Myers*, 59 Ohio St., 332; *Meador v. Blymer*, 60 Ohio St., 621. And this is true whether the changes introduced by the new law be in the form of an amendment or a supplement to existing statutes, as in the cases cited above, or a change of the common law, as was held in *Railway Co. v. Hedges*, 63 Ohio St., 339.

Section 218-223, Rev. Stat., if applicable, is unconstitutional.

If Section 218-223, Rev. Stat., can be construed as commanding or authorizing the admission in evidence of the documents in question offered by the state, then we submit that to that extent it infringes upon rights secured and guarantees given to the defendant by both state and federal constitutions.

We beg leave to call attention to a cardinal rule of constitutional construction always observed, and recently most happily expressed by the Supreme Court of the United States. *Fairbanks v. United States*, 181 U. S., 283; *People v. Cannon*, 139 N. Y., 32; *County Seat of Linn County*, 15 Kan., 500.

We have an opposite illustration in our own jurisprudence. Our constitution provides that all laws of a general nature shall have a uniform operation throughout the state. It provides also that corporate powers shall not be given by special act. This court has repeatedly held that while these provisions left to the legislature the power to classify, yet the classification, when made, must not be whimsical or without apparent reason, but must have a fitness of application to the subject of legislation. *Falk, Ex parte*, 42 Ohio St., 638; *Railway Co. v. Martin*, 53 Ohio St., 386; *Cincinnati v. Steinkamp*, 54 Ohio St., 284.

Instances of the transgression by the legislature, in adopting rules of evidence and procedure, of limits expressly imposed by the constitution or inherent in the ideas of trial by jury, equality of protection, and due process of law, are to be found in the following cases: *Dupy v. Wickwire*, 1 D. Chip., 237; *Merrill v. Sherburne*, 1 N. H., 199; *Proprietors of the Kennebec Purchase v. Laboree*, 2 Greenleaf, 275; *Thistle v. Frostberg Coal Co.*, 10 Md., 129; *Webster v. Cooper*, 55 U. S. (14 How.), 488; *Rich v. Flanders*, 39 N. H., 304; *Woart v. Winnick*, 3 N. H., 473; *Society v. Wheeler*, 2 Gall., 105; *Clark v. Clark*, 10 N. H., 380, 386.

Conversely it follows that in their opinion a statute which did destroy an existing right of defense would be a retrospective law. *State v. Beswick*, 13 R. I., 211.

Let us examine now the condition of the law as affecting the rights of these parties litigant, and the rules of procedure for determining those rights, as they stood prior to the passage of the act of 1889, and

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the changes which that law is claimed to have introduced.

Under the Canal Act of 1825, the state acquired legal title in fee simple to lands taken by it, and openly, notoriously and exclusively used for canal purposes; *State v. Railway Co.*, 53 Ohio St., 189. If the use were not exclusive, but merely incidental or constructive, or in common with that of the proprietor at the time the state's use began, his title would not be disturbed. *Smith v. State*, 59 Ohio St., 278; *Miller v. Weisenberger*, 61 Ohio St., 561; *State v. George*, 34 Ohio St., 657.

The defendant is confessedly in exclusive possession of the property in question. The petition filed by the Canal Elevator and Warehouse Company, the lessee of the state, shows that this exclusive possession began at least as early as 1868, thirty years before the bringing of this action.

The evidence offered by the defendant, if admissible, at least tended to show that the state had never made exclusive use of the property, and that the flowing of canal water over it had been the act of the defendant's predecessors in title for their own benefit, and not by them as a dedication to the state, or by the state as adverse to them, and consequently that the state, under the doctrine of *Smith v. State*, 59 Ohio St., 278, never gained title by occupancy.

According to principles as old as the common law, this possession is in itself, as graphically stated in Pollock & Wright on Possession, pages 22 and 23, "a root of title." It is in itself a species of title, and a perfect ground of defense until destroyed by the showing by the plaintiff of a prior possession in himself, or a better right to possession. *Ludlow v. McBride*,

3 Ohio, 240; *McNeely v. Langan*, 22 Ohio St., 32; *Trustees v. Thoman*, 51 Ohio St., 285.

Thus prior to the passage of this act of 1889, the defendant's predecessors in title, being in possession of this land, by that bare fact had title to it, and this title was good, and this possession was its muniment, as against all who could not show a better title, including the state of Ohio. It was a vested right; and although it was subject to defeat by one showing a better title not barred by the statute of limitations, yet until such showing was made it was as perfect and indefeasible as any other right.

Look now at the changes which it is claimed the act of 1889 has made. The state of Ohio, by producing the declaration of its agent that in his opinion it has title to the land, thereby introduces evidence not merely that it has title, but, being *prima facie*, of such weight as to overcome the possessory title of the defendant, and to require the defendant to show a better title. This opinion of the agent of the state is formed upon such inquiry as he may see fit to make, and consequently to omit making. The agent is not even required or authorized to rest his judgment upon sworn statements; for no authority is given him to administer an oath, and one administered by any other officer would, if taken, be purely voluntary, and not subject the witness to the penalty of perjury. *Hamm v. Wickline*, 26 Ohio St., 81.

We submit that if Sec. 218-223, Rev. Stat., has the effect which counsel for the state would give to it, it would attempt to accomplish the things which we have just mentioned, and for that reason it would be void as infringing upon the following provisions of the state and federal constitution. Constitution of

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Ohio, Art. 1, Sec. 1; Ib., Sec. 2; United States Const., amendment 14, Sec. 1; Constitution of Ohio, Art. 1, Sec. 19; Ib., Sec. 16; Constitution of Ohio, Art. 2, Sec. 28; Ib., Sec. 32, Art. 1, Sec. 5; Art. 4, Sec. 1.

We submit that the provisions in question infringe upon these constitutional provisions because:

1. It is retroactive.
2. It denies the defendant in this particular class of actions the equal protection of the laws, inasmuch as it subjects him to a burden and gives the state an advantage which does not exist in any other action to recover real property.
3. It attempts to destroy, and at least impairs, a vested right.
4. It attempts to give the state color of title to what is private property, and this without compensation.
5. It is an exercise of judicial power by the legislature.
6. It confers judicial power upon appointed executive officers.
7. It violates the right of trial by jury.

That the act is retrospective, and retroactive in effect, is the essence of the claim made by the state. *Commissioners v. Rosche Bros.*, 50 Ohio St., 103. And it is manifest, we think, that this statute does the things which Art. 2, Sec. 28, of our constitution so defined, prohibits.

It will be claimed by counsel for the state that as the statute but relates to admissible evidence and burden of proof, it is merely regulative of procedure, and so is remedial, and not within the inhibition. It has been expressly decided in New Hampshire (see *Rich v. Flanders*, 39 N. H., 304), that their constitutional provision forbidding retrospective legisla-

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tion throws at least the same protection over litigants in civil cases which the *ex post facto* provision of the federal constitution, Art. 1, Sec. 10, gives to persons accused of crime. From the very beginning the clause in the federal constitution against *ex post facto* laws has been considered as prohibiting a change in the rules of evidence so as to receive for conviction less or different testimony than the law required when the crime was committed. *Calder v. Bull*, 3 U. S. (3 Dall.), 386, 390. And this exposition has been again approved in the last pronouncement of the Supreme Court of the United States upon the subject. *Mallett v. North Carolina*, 181 U. S., 589; *Coal Co. v. Rosser*, 53 Ohio St., 12; *State v. Gardner*, 58 Ohio St., 599.

That it impairs vested rights and violates rights of property is also manifest.

It practically transfers title from the defendant to the state. The defendant has title to the property by its bare possession, but this title does not avail it because, and only because, the state is plaintiff. This title then is destroyed, the benefit of it transferred to the state, and the defendant put to proving a better title. Nor is even that sufficient. The state under the act is entitled to recover unless the defendant proves affirmatively that the state's claim of title is false. He loses his own vested right to hold the property until one comes having a better title than he, and is given in return the empty privilege of attempting to prove facts which can be established only by witnesses long since dead. How inconsistent this is with the rights secured by our constitution can be seen by a perusal not merely of the cases we have cited from other jurisdictions, but from the following in our own.

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reports: *McCoy v. Grandy*, 3 Ohio St., 463; *Magruder v. Esmay*, 35 Ohio St., 221; *State v. Guilbert*, 56 Ohio St., 575.

That the act is either an exercise of judicial power by the legislature, or is the conferring of judicial power upon appointed executive officers is, we think, clear. The opinion of the canal commission embraced in its finding which is made evidence, is not of itself and by its own weight probative of the facts it declares. The legislation which requires such conclusion to be accepted as presumptively correct in the adjudication of rights, is in fact not legislation, but arbitrary decision, judicial action, or else is the conferring upon those officials of judicial power. It clothes their action with the attributes which theretofore had pertained to courts of justices only. *State v. Guilbert*, 56 Ohio St., 575.

And for this reason such legislation also violates the right of trial by jury. That right, as secured by the constitution, means the right of trial by jury in like manner and in like cases as at the common law. *Capital Traction Co. v. Hof*, 174 U. S., 1; *Work v. State*, 2 Ohio St., 296.

The lease to Brown and Wood barred a recovery.

A part of the evidence offered by the state consisted of a lease of the premises in controversy to Thomas Brown and Adolph Wood, dated April 23, 1868, for "the term of ninety-nine years, renewable forever upon the same terms." There is nothing in the record showing that the lease is not now in as full force and effect as it was when executed. It does appear that the lessees assigned their interest to the Canal Elevator and Warehouse Company, December 17, 1868, and that is the end of the evidence on the sub-

ject. We submit that the fact of this outstanding lease was sufficient ground for the judgment below. The effect of it was to show that the state had transferred the right of possession, if any she had, to the persons named as her lessees—and for that reason could not maintain an action of ejectment for the possession of the property.

The facts conclusively establish the truth of the allegation of the answer, that the action by the Cincinnati Elevator and Warehouse Company, lessee of the state, was brought upon the advice and procurement and with the assistance of the state, and was prosecuted to final judgment by the attorneys employed, paid and controlled by, the state. The cause of action was the same as in this; and while the parties to the record are not the same, the defendant derives title from, and is in privity with, Buckingham & Mathers, defendants in the former action, and the state was the lessor of the plaintiff, as well as the moving party in the prosecution of the former action, which was prosecuted with its means, under its control, and for its benefit, in the name of the Canal Elevator and Warehouse Company.

Under these circumstances we submit the plaintiff was estopped to maintain the action below. Although the state was not named as a party to the previous action, it is nevertheless bound by the judgment. It frequently happens that parties other than those whose names appear on the record of a judgment are estopped by it. If a party causes a suit to be brought for his own benefit in the name of another it is clear that such party is bound by the result, upon the same principles that he would be bound by the result of an action in his own name. Greenleaf on Evidence, Secs.

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522-523; *Lovejoy v. Murray*, 70 U. S. (3 Wall.), 1; *Robbins v. Chicago*, 71 U. S. (4 Wall.), 657; *Litchfield v. Goodnow*, 123 U. S., 549; *Hauke v. Cooper*, 108 Fed. Rep., 922; *Chambers v. Lapsley*, 7 Pa. St., 24; *Calhoun v. Dunning*, 4 U. S. (4 Dall.), 120; *Davis v. Wood*, 14 U. S. (1 Wheat.), 6; *Plumb v. Goodnow*, 123 U. S., 560; *Valentine v. Mahoney*, 37 Cal., 389; *Yates v. Smith*, 38 Cal., 60; *Douglas v. Fulda*, 45 Cal., 592; *Altschul v. Doyle*, 55 Cal., 633; *People's Sav. Bk. v. Hodgon*, 64 Cal., 95, 98; *Reay v. Butler*, 69 Cal., 572, 574; *People v. Holladay*, 93 Cal., 241; *Freeman on Judgments*, Secs. 174, 185.

One who prosecutes or defends an action by employing counsel, paying costs, and doing those things which are usually done by a party will be bound by the judgment rendered therein. *Stoddard v. Thompson*, 31 Ia., 80; *Lyon v. Stanford*, 42 N. J. Eq., 411; *Conger v. Chilcote*, 42 Ia., 18; *Warfield v. Davis*, 14 Mon. (B.), 33; *Elliott v. Hayden*, 104 Mass., 180; *Castle v. Noyes*, 14 N. Y., 329; *Jackson v. Griswold*, 4 Hill, 522; *Train v. Gold*, 5 Pick., 380; *Tate v. Hunter*, 3 Strob. Eq., 136; *Wood v. Ensel*, 63 Mo., 193.

Where a suit is brought in the name of a party for the benefit of another, who directed and advised the same, the latter though not a formal party to the record, is a privy in interest and will be concluded by the judgment. *Cole v. Favorite*, 69 Ill., 457; *Bennitt v. Mining Co.*, 119 Ill., 9.

If one enters upon the possession of the lessee, this ousts the lessor of his freehold. 6 Com. Dig. Tit. Seisin, letter F; *Foster v. Morris*, 3 A. K. Marsh., 609; *Taylor, Landlord and Tenant*, Sec. 180.

It is the duty of the landlord to put his tenant into complete possession of the premises. *Taylor, Landlord and Tenant*, Secs. 176, 177.

In a number of cases it has been held that a landlord is not bound by a proceeding in ejectment against his tenant of which the landlord had not notice, but it is generally conceded that the result would be otherwise if the landlord had notice. *Lowe v. Emerson*, 48 Ill., 162; *Cadwallader v. Harris*, 76 Ill., 370; *Douglas v. Fulda*, 45 Cal., 592; *Striddle v. Saroni*, 21 Wis., 173; *Oetgen v. Ross*, 47 Ill., 142; *Sampson v. Ohleyer*, 22 Cal., 200.

The evidence discloses the facts that the litigation in the case of the *Canal Elevator and Warehouse Co. v. Buckingham & Mathers* was commenced by the officers of the state pursuant to authority granted by the general assembly, and was conducted and controlled throughout by counsel retained and paid by the state. The title of the state to the property in dispute was the sole ground of controversy. The large rental, reserved by the lease as well as all reversionary rights of the state were at stake. The board of public works and general assembly were fully alive to these facts. It will be noted that in one of the reports of the board of public works the case is alluded to as that of "the *State v. Buckingham & Mathers*," and their final report is that the decision was adverse to "the state." As the chief party in interest it was the right of the state to institute and control the litigation—upon the same principle that any surety or warrantor of title has the same right—and for these reasons the state is necessarily bound by the judgment.

There is nothing, we submit, to exempt the state from the operation of the rules of law applicable to individuals in such cases. *State v. Buttles*, 3 Ohio St., 309; *Curran v. Arkansas*, 56 U. S. (15 How.), 304; *Davis v. Gray*, 83 U. S. (16 Wall.), 203.

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If authority is needed to show that in Ohio a judgment in ejectment concludes parties and their privies it will be found in *Hinton v. McNeil*, 5 Ohio, 509.

The construction of the canal by the state of Ohio through the city of Cincinnati was plainly a matter of public and general interest, and the declarations of deceased persons who were in a position to know the facts whereof they spoke as to its existence and boundaries, and other facts and circumstances relating to it, are admissible on the ground that declarations of deceased persons as to matters of public and general interest are admissible as evidence. Wherever boundaries of public property or subdivisions of the state coincide with or define boundaries of private estates, evidence as to such boundaries derived from declarations of deceased persons having knowledge thereof is admissible. 1 Whart. Ev., Sec. 185; 1 Greenleaf, Sec. 145; *People v. Velarde*, 59 Cal., 457; *Detweiler v. Toledo*, 6 Circ. Dec., 297; 13 C. C. R., 572; *Caldwell v. Carthage*, 40 Ohio St., 453.

BURKET, J. The state does not claim or derive title to the basin from or through the Canal Elevator and Warehouse Company, and it was not a party plaintiff or defendant in the action brought by that company for the recovery of the basin, and the judgment was not against the state, but against the company alone. The general rule is that to be bound by a judgment the party to be bound must have been a party or privy in blood or estate. Here the state was neither.

For a record to constitute a bar or *res adjudicata* against one not a party or privy, but who assisted in the prosecution or defense of the action in aid of some interest of his own, the record itself must in

some way show such assistance. *State of Florida v. State of Georgia*, 58 U. S. (17 How.), 478.

If, however, the record is to be used merely as an estoppel *in pais*, then the advice, assistance or procurement may be shown by evidence *aliunde* the record under the usual rules of estoppel. Many cases have been cited and distinguished by counsel, but all of them fall under one or the other of the above rules, or else are controlled by local statutes or rules of decision.

Actions by or against the state can be brought only by express authority of the general assembly, and the state cannot be estopped by an act of its officers, unless the state has by statute authorized such officer to act on that behalf, and then the estoppel can be no broader than the authority. The estoppel in such cases is not so much *in pais* as by statute.

As the state was not a party or privy to the record, and the record fails to show that the state assisted in the case, and the general assembly not having passed any act authorizing such action, or such assistance, it follows that the state is not bound or estopped by that record, and that the court of common pleas erred in admitting the same. Whether such error was prejudicial will be considered further along.

The state had the right to prove the dimensions of the berme bank and tow-path, but such proof should have been made by the original, or certified copies, of the specifications and rules adopted for the construction of the canals. An epitome prepared by the canal commission would not be competent evidence.

Before the enactment of the canal commission statute, when the state undertook to recover canal lands from one found in possession thereof, it had to prove

in the first instance that the lands were formerly canal lands. Such proof showed that the state was formerly the owner in fee simple of the lands, and that fact being proven or conceded, overcame the possessory right of the defendant, and threw upon him the burden of showing that he had in some lawful manner, either by lease or purchase, acquired the lands from the state. As the statute of limitations could not run in his favor, as against the state, his continued possession could never ripen into a title, and therefore the rule that one in possession of lands can be dispossessed only by one showing a better title is not applicable, because by showing that the lands were formerly canal lands, the state shows a better title, a title that must prevail as against everybody, unless a title from the state is shown, and the burden of showing such title rests upon the defendant.

Section 218-221, Bates' Statutes, after providing for the appointment of a canal commission, makes it the duty of such commission to "proceed to survey and determine the boundaries of all lands heretofore appropriated for canal purposes, and owned by the state, the boundaries of which are not now accurately known and of record, as already surveyed, and to mark the same by proper monuments, and to make maps and plats of all said canal lands not already platted, together with the necessary description and location of all bridges, culverts and aqueducts, and shall clearly indicate and describe in their report any part of said property that in their judgment is not necessary for canal purposes, all of which is to be preserved as hereinafter provided."

Section 218-223, Bates' Revised Statutes, is as follows: "Each of said commissioners is hereby author-

ized to issue subpoenas for, and compel the attendance of such witnesses as they, or either of them, may think necessary in fixing said boundaries, or ascertaining any fact which said commission should ascertain in the discharge of its duties; and the testimony so taken, together with said maps, plats, and field notes of such surveys, and the report of said commission as to the boundaries of the lands belonging to the state of Ohio, with its findings in that behalf, shall be filed for preservation in the office of the board of public works; and upon any trial in any of the courts of this state, any of said findings, maps, plats, or surveys, which may in any manner relate to or having any bearing upon the subject-matter at issue, shall be taken and held to be competent (*prima facie*) evidence of the truth of such findings, and the boundaries of said lands, and that the state of Ohio has the ownership of said land, or such an interest in it as may be therein stated; and a duly certified or sworn copy of such findings, plat, or map shall, when produced on said trial, have the same force and effect as the original from which it was taken would have under this section if produced on said trial."

The court of common pleas refused to permit the findings, maps, plats and surveys so made under these sections to be introduced in evidence by the state, holding said last named section to be unconstitutional.

It will be noticed that by section 218-221, the canal commission is authorized to survey and determine the boundaries of lands appropriated for canal purposes, and owned by the state. Other lands the commission has no authority to survey or determine its boundaries. So that as to each tract of land the first

question to be determined is, whether it has ever been appropriated to canal purposes and owned by the state, that is, was it heretofore canal lands? As between the state and a person found in possession of lands which the state claims as canal lands, this question must be determined by evidence in court where each party can be heard under the rules applicable for the trial and determination of disputed facts; and upon such trial the findings, maps, plats, and surveys made by the canal commission are not competent evidence. Such findings, maps, plats, and surveys can be made only as to canal lands, and to say that because they are made, that therefore the lands are canal lands, is not sound reasoning. Such findings, maps, plats, and surveys are made without notice to the party in possession, and therefore cannot bind him even *prima facie*. Were it otherwise the commission might make findings, maps, plats and surveys of any person's land, and thereby prove that such lands were canal lands, and being canal lands, the fee simple title would be in the state; so that the power would be in the commission to divest a man of his title without notice or trial, and to vest the title in the state, at least *prima facie*. This would clearly be in conflict with that part of section nineteen of the Bill of Rights which declares that "Private property shall ever be held inviolate."

But it is urged that the findings, maps, plats, and surveys are not conclusive, but only *prima facie* evidence of title in the state, and that the general assembly has power to prescribe the rules of evidence, and provide what shall make a *prima facie* case, and numerous authorities are cited in support of this prop-

osition, among others *Railway Company v. McCann*, 54 Ohio St., 10.

That the general assembly has power to prescribe what shall constitute a *prima facie* case must be conceded; but that power under our constitution extends only to future transactions, and as to such the statute is read into the transaction, and forms a part of it; but as to past transactions the general assembly has no power, by a change of the rules of evidence, to add new burdens, or impose new duties. This is forcibly illustrated by comparing the cases of *Railway Company v. McCann*, *supra*, and *Railroad Company v. Kreager*, 61 Ohio St., 312, with *Railroad Company v. Hedges*, 63 Ohio St., 339. In the two former cases the transactions occurred after the passage of the *prima facie* statutes, and it was correctly held that those statutes were applicable to the cases; but in the latter case the transaction occurred before the passage of the *prima facie* statute, and it was held that the statute was not applicable to the case, being in effect retroactive.

This court held in *Miller v. Hixson*, 64 Ohio St., 39, first paragraph of the syllabus, as follows: "A statute which imposes a new or additional burden, duty, obligation, or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article two of the constitution, which provides that, 'The general assembly shall have no power to pass retroactive laws.' "

This section 218-223, attempts to make the findings, maps, plats, and surveys of the canal commission proof of the fact that the lands in question were canal lands, and to thereby relieve the state from proving that fact in the ordinary way *aliunde* such findings,

and to impose upon the defendant the additional burden of overcoming the *prima facie* case thus made by the state. The statute therefore imposes an additional burden upon the defendant as to a past transaction, and is therefore retroactive in character and effect, and as to past transactions unconstitutional. The court therefore did not err in excluding said findings, maps, plats, and surveys.

It therefore follows that in an action by the state for the recovery of what it claims to be canal lands, it must prove that the lands in question were heretofore canal lands, and in making such proofs it cannot be aided by the findings, maps, plats, and surveys made by the canal commission.

Aside from said findings, maps, plats, and surveys thus properly excluded, the state offered no evidence tending to prove that the basin in question had ever constituted part of the canal system of the state. Two witnesses testified that they had gone into the basin with their canal boats and loaded and unloaded them at the docks of the owners of warehouses on or near the banks, turned their boats around in the basin, etc. This user is not at all inconsistent with the basin being a private basin, used by private proprietors in connection with the canal, and for the mutual benefit of both parties, as was the case in *Smith v. State*, 59 Ohio St., 278.

The first answer filed in the case of *Canal Elevator and Warehouse Company v. Buckingham & Mathers*, stated that the state of Ohio had excavated said basin, which, if true, would go far to prove that the basin was at one time a part of the canal system of the state; but afterward an amended answer was filed in which it was stated that the basin was excavated by

the adjoining proprietors for their own benefit, and it was upon this amended answer that the case was tried, and in legal effect the amended answer withdrew the statement that the state had excavated the basin. No evidence therefore is found in the record tending to prove that the basin ever constituted part of the canal system of the state, and the verdict of the jury was right notwithstanding the error of the court in admitting the record in the Warehouse case. As the case went to the jury that error was not prejudicial.

There is another reason why the state could not recover, and why the admission of that record was not prejudicial. The lease by the state to Brown & Wood, of date of April 23, 1868, for ninety-nine years renewable forever, was introduced by the state, and the record shows that Brown & Wood accepted the lease without being put into possession, and assigned the lease to the Canal Elevator and Warehouse Company. The latter company waived the right it had to insist that the state should put it into possession, and undertook by action to recover the possession itself, and for that purpose plead and relied upon the lease from the state; so that the state was treated as being out of the contest, and as having performed its duty toward its lessees as to possession, and the lessees assumed the burden of obtaining possession under the lease. Under those circumstances the state had no further right of action to recover possession, as there could not be one action by the state and another by its lessee. As between the state and its lessees, the case therefore stands as if the state had in fact put its lessees into possession. There is nothing to show that the state has been reinvested with the right of posses-

sion, and therefore the state had no right of action to recover possession, and the verdict was on this ground also properly in favor of the defendant below.

Judgment affirmed.

WILLIAMS, C. J., SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

SCHAAF ET AL. v. THE CLEVELAND, MEDINA & SOUTHERN RAILWAY COMPANY ET AL.

66 215
66 172

Interurban railroad on side of public highway—An interference with easement and right of way of abutting farms, when—Conditions similar to those of steam railways—Effect of construction of electric plant in connection with such railway—Plaintiff entitled to injunction, when.

1. The construction and operation of an interurban railroad laid with T rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway—the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter and government mail, is an additional burden on the public highway and obstruction to, and interference with the plaintiffs' easements and rights therein, not substantially different from those that are imposed by the construction and operation of steam railroads, under like conditions.
2. The construction and operation of an electric plant in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another additional burden which is an invasion of the plaintiffs' property rights.
3. The plaintiffs are entitled to injunction, in such case, to prevent the construction and operation of such railroad, and of such electric plant, or either, until compensation and damages shall be assessed them in a proper appropriation proceeding, and paid, or secured to be paid.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

The plaintiffs in error brought their action in the Cuyahoga common pleas against the Cleveland, Medina & Southern Railway Company and John Davis to enjoin the construction and operation of a railroad along and over a public highway, known as the Wooster pike. The plaintiffs are the owners of improved farms which abut on this public road and their titles in fee extend to the center of the road. They reside on these farms and in connection therewith make all the uses of the road that abutting proprietors are accustomed to do. The road has been improved and constitutes their means of access to their lands, and they have never consented to the construction of the railroad thereon.

The petition alleges that "they are the owners of and are seized as of estates in fee simple of certain tracts of land located in Middleburg township, Cuyahoga county, state of Ohio, and which tracts of land abut on the western side of what is known as the Wooster pike, which is a road or highway dedicated to public use for the purpose of a road or highway; that these plaintiffs are the owners of the fee to the center of said road on the portion of said road upon which the lands of these plaintiffs abut subject only to the right of the public use as such road or highway; that the board of commissioners of Cuyahoga county have heretofore granted to another corporation, to-wit: The Wooster, Medina & Cleveland Street Railway Company, the right of way in said Wooster pike so far as the said board of commissioners have power to grant the same to construct and build a railway over and along said Wooster pike and especially on the portion of said Wooster pike upon which the lands

of the plaintiffs above described directly abut and the title to which is in these plaintiffs subject only to said public uses as above set forth; that the defendant, The Cleveland, Medina & Southern Electric Railway Company, claims to be entitled to all the rights of the said, The Wooster, Medina & Cleveland Street Railway Company, so acquired from said board of commissioners; that the said defendant railway company without having acquired the right from these plaintiffs or under the statute in such cases made and provided, is about to and unless prevented by order of this Honorable Court, will, through its agents, contractors and servants wrongfully and unlawfully erect large wooden poles on the land of these plaintiffs along said highway for the purpose of supporting electric trolley wires to be used in connection with the proposed electric railway, and the said defendant railway company also threatens, through its agents, contractors and servants, to proceed to lay and construct a railroad suitable for the use of operating electric cars on the side of said highway, the title to which is vested in these plaintiffs as above set forth; and when the said railroad is completed the defendant railway company through its agents and servants will operate and run over said railroad electric cars at a very high rate of speed, said cars it is proposed to have carry passengers and freight from various points through the counties south of Cuyahoga county.

“Plaintiffs further say that the defendant railway company has entered into a contract with the defendant, Joseph Davis, for the furnishing and erecting of said wooden poles, and the said defendant, Joseph Davis, has already distributed the poles along the lands of these plaintiffs and is about to erect and set.

them along the lands of these plaintiffs in the manner above set forth.

"Plaintiffs further say that the erecting of said poles and the construction of said railroad and the laying of the tracks along said highway as contemplated in the manner above set forth and as provided for in the grant of the right of way by the said county commissioners, and the running of the electric cars thereon, will have the effect of seriously interfering with plaintiff's enjoyment of their property above described and will result in great diminution of the value thereof and of the value of the private rights and easements which they now respectively have in said highway, and especially will seriously interfere with their means of access to and from their respective tracts of land and will render it absolutely impossible to hitch their teams along that side of the highway or to allow them to stand in said highway.

"Plaintiffs further say that such contemplated use of the said highway by the said defendants in the manner hereinbefore set forth is an essential and great diversion of the said property to uses and purposes other than those for which it was acquired by the public use as to accumulate materially additional burdens upon the lands and as to destroy and impair the incidental rights of the plaintiffs appurtenant to their lands on said highway and that the damages resulting therefrom will be irreparable, and that said defendant railway company is insolvent and unable to pay its obligations or any judgment for damages which these plaintiffs might recover against them by virtue of the premises.

"Plaintiffs further say that these defendants have been notified by all the plaintiffs herein or by their

agents that these plaintiffs objected to the proposed acts of the defendant, Joseph Davis, has only accelerated the work and has been laying telegraph poles by day and night and without any right whatsoever to do it, is unlawfully distributing them along the front of the land of these plaintiffs, and if the court should require any notice to be given of an application for a restraining order in this case such notice will only give the said defendant, Joseph Davis, and the said defendant railway company opportunity to erect all of said poles before the said restraining order can be granted on notice to these defendants.

"Wherefore, plaintiff prays that an order may issue from this Honorable Court forthwith restraining these defendants, their officers, agents, contractors and servants from further carrying on any portion of their work in the manner above set forth and that such order be issued without notice to these defendants for the reason that the object for which this injunction is prayed may in great measure be defeated by the giving of any notice to said defendants and that on the final hearing of this case a perpetual injunction may be granted forever restraining these defendants or either of them or their officers, agents, contractors or servants from carrying on any portion of said proposed work and plaintiffs ask for such other and further relief as in good conscience they may be entitled to."

The only material part of the answer is a denial that the building of the railway will interfere with plaintiffs' enjoyment of their property, or depreciate its value, or become an additional servitude upon the highway.

The circuit court dismissed the petition and rendered judgment against the plaintiffs for costs, from which error is prosecuted here. That court made a finding of the facts, the substance of which will appear in the opinion.

Messrs. Herrick & Hopkins, for plaintiff in error.

Whatever the law may be in the other states the rule is well settled in Ohio that the rights of the public and the abutting owner in the highway are entirely separate and distinct from each other. *Crawford v. Delaware*, 7 Ohio St., 459.

The law is also well settled that the rights and interest of the abutting owner are greater in the country highway than in the city street. Elliott on Roads and Streets, pp. 299, 308; Thompson on Highways, p. 6; 2 Dillon Munic. Corp. (3 ed.), 686.

The public has a right of passage and the right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. *Daily v. State*, 51 Ohio St., 348.

The abutting owner has the right to all uses of the land not inconsistent with this right of passage and improvement, 3 Kent, Sec. 432.

He has the right to cultivate and raise crops on so much of his side of the highway as is not actually used for travel.

He has the right to plant, raise and enjoy trees on that portion not used for travel.

He has a right to the herbage and may graze his cattle thereon; and may maintain trespass against others who put their cattle there to graze. Angell on Highways, Sec. 303.

He has the right to store lumber, wood and building materials on such portion. *Clark v. Fry*, 8 Ohio St., 358. Also to hitch horses.

He has a right to the quiet enjoyment of his premises and not to be interfered with by unusual disturbance, such as shooting, organ grinders, etc. *Regina v. Pratt*, 4 El. & Bl., 860; *Adams v. Rivers*, 11 Barb., 393.

Also to lay drains and water conduits across the highway, restoring highways to safe condition of travel. Angell on Highways, Sec. 303.

The most important right of the adjacent owner is that of a free and convenient "easement of access" to and from the highway at all points along his frontage. *Street Railway v. Cumminsville*, 14 Ohio St., 523; *Branahan v. Hotel Co.*, 39 Ohio St., 333.

The following acts have been held to be infringement of the rights of an abutting owner in a country highway:

Laying gas pipes in such highway. *Bloomfield Gas Co. v. Calkins*, 62 N. Y., 386.

Running a shafting across the road under a bridge. *Estey v. Baker*, 48 Me., 495.

Shooting at a bird from the highway by one passing along it. *Regina v. Pratt*, 4 El. & Bl., 860.

Standing in the highway and using vulgar language to the owner. *Adams v. Rivers*, 11 Barb., 390.

Laying water pipes in the country highway. 7 Del. Co. Rep. (Pa.), 373.

Erecting electric lighting wires and poles. *Palmer v. Larchmont Elec. Co.*, 6 N. Y. App. Dec., 12.

Using highway as a landing place for a ferry. *Chambers v. Furry*, 1 Yeates, 167.

Constructing trolley railroad. *Osborne v. Railway Co.*, 9 Pa. Sup. Ct., 632.

Erecting telephone poles and lines. *Chesapeake & P. Phone Co. v. Mackenzie*, 28 Am. St. Rep., 219.

Cutting timber along the highway. *Roberts v. Failis*, 1 Cow., 238.

Cutting down a hedge. *Phifer v. Cox*, 21 Ohio St., 248.

Erecting and maintaining a telegraph line. *Daily v. State*, 51 Ohio St., 348; Cooley on Const. Limit. (4 ed.), 680.

The foregoing enumeration of violations of the rights of the abutting owner in a country highway abundantly proves the jealous care of these rights which our courts have heretofore exercised. It is submitted that they also materially assist in the decision of this case. *Railroad v. Williams*, 35 Ohio St., 168; *Daily v. State*, 51 Ohio St., 348.

The road will be a thoroughfare and not a mere local convenience. Its very name indicates that it is a thoroughfare. Cooley on Const. Limit. (4 ed.), Sec. 556; *Railway Co. v. Heisel*, 38 Mich., 62.

A street railway is also intended to carry passengers only and not freight. *Williams v. City Electric Ry. Co.*, 41 Fed. Rep., 556; Booth on Street Railways, Secs. 1 and 90; Elliott, Roads and Streets, p. 557; *Carli v. Street Ry. Co.*, 28 Minn., 373.

The only point of material difference is in the motive power, but the rule seems to be well established that the question as to whether or not the burden upon the highway is increased depends not upon the motive power used but upon the character of the use as well as the purpose and manner of construction. *Nichols v. Railway Co.*, 87 Mich., 361; *McQuaid v. Railway Co.*, 18 Ore., 237.

In no sense of the word, therefore, can the defendant's railway be treated as a street railway, but it should rather be classed as a steam railway. It is therefore submitted that the rule laid down in *Railway Company v. Williams, supra*, is applicable to this case.

It would also seem that the ruling of the Cummins-ville case is applicable here; that a track laid with T rails above the grade of the street, and next to the curb line would be a much greater obstruction to the convenient access to the land than the track described in the Cumminsville case.

Mr. G. R. McKay and Messrs. Newman & Ullman,
for defendants in error.

The facts stated by plaintiffs in error in their brief are correct with this exception, that the defendant railway company did not propose to construct its roadway right next to the curb line, but were to construct it in accordance with the terms of their franchise and as directed by the county commissioners. There was no evidence to show that a T rail was to be used, the president of the company, Mr. Joseph W. Roof, having testified that the kind of rail to be used had not been decided upon.

It is admitted by all parties that this is a public highway and has been used as such for many years; that this railway company had obtained the consent of owners of more than a majority of all the feet front along said highway; that permission had been given them by the county commissioners to occupy said highway and every necessary step had been taken by the said railway company to comply with the statutes of Ohio.

There is no dispute between counsel in this case as to the law, as all the cases cited in the brief of plaintiffs in error were thoroughly gone into before the circuit court, and in the opinion of the counsel for defendants in error the law is well established as stated in *Street Railway v. Cumminsville*, 14 Ohio St., 523; *Railway Company v. Williams*, 35 Ohio St., 168; *Railway Company v. Lawrence*, 38 Ohio St., 41. It is simply a question of fact for the court to determine as to whether or not any of these plaintiffs in error have been deprived of any right or been materially injured.

There being no dispute as to the law, and it being well established in this case, defendants in error claim that this case must be decided upon the facts brought out in the hearing. After a careful hearing the common pleas court dismissed the case begun by plaintiffs in error and refused to grant an injunction, deciding that their right of ingress and egress would not be interfered with; that no incidental right would be impaired and that plaintiffs in error would not suffer any material injury. The circuit court affirmed that decision after a long and careful hearing of the facts, and specifically found that no right of the plaintiffs in error was being materially injured and refused to grant an injunction against defendants in error, and the same facts are presented to this court as were presented to the common pleas and circuit courts.

In no manner are their rights of ingress or egress interfered with, as they could not enter upon any of the farms along that highway before first constructing a bridge across this ditch, running the entire frontage of the farms along this highway; no shade

trees will be interfered with or injured in any manner. The photographs attached to the affidavits as exhibits, will show the position and location of the poles. Especially in front of the blacksmith shop of Hutchinson, the court will notice the manner in which bridges had to be constructed across this deep ditch so that access could be had to the farms.

We would refer the court specifically to the finding of facts of the circuit court, section 3, to show the width of the highway and the location of this proposed railway, and by reference to the photographs attached, the court will see that no right of the plaintiffs in error has been interfered with in any manner, will not prevent them raising crops, the line will not interfere in the least with any of their trees, their cattle can graze at large over acres of ground, they could not now hitch their horses in this ditch, there would be no occasion for the loading or unloading of wagons in the ditch, for they could not drive a wagon in there now without upsetting.

WILLIAMS, C. J. The circuit court found, as the plaintiffs allege in their petition, that they are the owners of improved farms, on which they reside, that front and abut for considerable distances on the public road in question, and that they own the fee of their lands to the center of the road. This road has long been used by them as their means of ingress and egress to and from their farms, and for all the purposes of a public highway. That: "The said highway upon the westerly side of which these plaintiffs' lands are located, is sixty feet wide from fence to fence, the width of the sidewalk between ditch and fence on each side is eight feet; and the width of the

roadway as established is thirty-two feet; upon each side of said roadway and immediately adjacent thereto is a ditch six feet wide, from two to three feet deep, the entire frontage of plaintiffs' land except seventy-five feet in front of the house on the land of said John Hurst, and about forty feet in front of the blacksmith shop on said land, and except also about 125 feet in front of the house on Daniel Hutchinson's property, in all of which said places said ditch has been tiled and filled in, and upon the easterly side of said traveled roadbed immediately next to the ditch is a brick pavement eight feet wide. And upon the extreme westerly side and edge of said roadway, defendant railway company, purposes to construct a railway by laying ties, and placing thereon T rails, such as are ordinarily used by suburban railways, the nearest part of which shall not be nearer to the center of said roadway than eleven feet in accordance with the terms of said franchise, and nineteen feet from the nearest edge of the brick pavement upon the extreme opposite side of the said traveled roadbed, and to maintain upon the westerly side of said highway poles for the carrying of trolley wires, feed wires and vires for the carrying of electric power to be sold to parties desiring electric light, heating or power, and to operate on said railway, cars propelled by electricity and further to carry upon same passengers and freight."

That the railway company having presented to the board of county commissioners the written consent of the owners of more than half of the feet front of the lands abutting upon the public highway, but without the consent of any of the plaintiffs, obtained from that board the grant of a franchise to construct, lay,

maintain and operate for a period of twenty-five years, along and over this public highway, in all respects according to the plans and purposes of the railway company as hereinabove stated and set forth, "a single track street railway, with all suitable convenient side tracks, switches, turnouts, turntables, stations and appurtenances. Also for the right to construct and maintain all necessary wires to connect its feed wires with adjacent property along the route therein petitioned for, necessary to supply light, heat or power to such adjacent property and all other things necessary to operate a street railway with electricity or other approved motive power acceptable to the county commissioners. The right herein granted is, to operate a street railway for the transportation of passengers, baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail."

The grant fixes a time within which the railway shall be commenced, and completed, requires cars to be run over it "as often as three times each way daily," and contains some regulation relating to the fare. The board of commissioners reserved the right to grant similar franchises to other companies.

The court announced as its conclusion of law, that, upon this state of facts the plaintiffs were not entitled to the relief they sought, and rendered judgment accordingly. In that conclusion we are unable to concur. In our opinion the construction and operation of the railroad as authorized and proposed, must necessarily constitute a serious obstruction to the plaintiffs' use of the public highway as a means of access to their farms, and an additional burden on the highway not contemplated in its originally intended uses. The whole burden of the railway, with all of

its authorized appurtenances, is thrown entirely upon the side of the public road next to the plaintiffs' lands, and between them and the traveled part of the roadway. The nature of that burden is not different in any material respect from that imposed by the construction and operation of a steam railroad. The difference, if any, is merely in the degree of the burden and not in its character; and can scarcely be less in any degree. It may become more onerous and injurious. As shown by the findings of the court, the railroad is to be built and maintained on the "extreme westerly side and edge" of the traveled way of the public road, that is between the traveled roadway and the plaintiffs' lands, and the tracks are to be laid with the ordinary "T" rails which project some distance above the ties—the same kind of rails usually employed in the construction of steam railroads through the country. While public crossings and extensions of farm lanes, are required to be planked to a certain extent, it often becomes convenient and necessary to drive onto and off the traveled roadway, elsewhere, with loaded and empty vehicles, to which this railway will present the same obstructions, and cause the same hinderance, delay and annoyance that attend the crossing of steam railroads. Then, this railroad company is authorized to construct and use, on the same side of the public road between its traveled way and the plaintiffs' lands, "all suitable and convenient side tracks, switches, turnouts, turntables, stations and appliances," without limit to their extent, other than as the company may deem them convenient and suitable. And, in addition to this, the company is given authority to erect and maintain on the same side of the public roadway, and next to the plaintiffs' lands, all poles, which are of large dimen-

sions, and all wires and other appliances, necessary to enable it to operate an electric plant for supplying light, power and heat to consumers, for profit. Besides, this company is authorized, not only to carry passengers, but also to transport over the road, "baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail;" and, though it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars, or trains, for freight or passengers, or both combined, or the size or make-up of the trains. All things considered, it is reasonably certain from the facts found that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiffs' property, in the same sense. The law governing the rights of parties in such cases, is well settled in this state, and we need only to refer to the case of *Railroad Co. v. Williams*, 35 Ohio St., 168, for a clear and satisfactory statement of the law. It is there held that:

"As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel or plank the road in such a manner as to make it most convenient and safe for use by the public, for the purposes of travel and transportation in the customary manner, which is well under-

stood to be by the locomotion of man or beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance.

"In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon a public highway. But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway; and also making compensation to the owner of private property taken for the use indicated. In such case, the rights of the public, and the rights of the owner, are entirely distinct; and the consent, express or implied, of one to the appropriation, would not bind or affect the rights of the other. But we are not dealing with the public right. It has already been said that the plaintiff, in the probate court, was the owner in fee of the land covered by the highway. This was her private property within the meaning of the constitution, subject only to the easement of the public therein. The nature and extent of this easement was above shown. The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was

established. This new use to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor, in the mode prescribed by law."

We are aware that decisions in other states may be found which do not entirely agree with ours; but the Ohio rule above announced has been established for many years, going back to *Crawford v. Delaware*, 7 Ohio St., 459, and has never been departed from. We are entirely satisfied with it.

And it is obvious also that within this rule the construction and operation of an electric plant, with its appliances, in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power and light to consumers for profit, constitutes another and additional burden which is an invasion of the plaintiff's property rights. The relative rights of an owner of land and of a private electric company which seeks to erect and maintain electric poles and wires in a public way, on which such land abuts, without the owner's consent, or without the compensation guaranteed to him by the constitution, were thoroughly considered in the case of *Callen v. Columbus Edison Electric Light Company*, 66 Ohio St., 166, *ante*.

The right of the owner to injunction against the threatened invasion and subjection of his property rights for the benefit of the corporation in such case is so logically and satisfactorily maintained in the opinion of Spear, J., that the citation of other au-

thorities is not deemed necessary. The case on that subject is equally decisive of this one.

It being ascertained that such an additional burden as has been stated, will be imposed on this public highway and the plaintiffs' abutting right and property, the extent of the burden and its effect on the value of the property, including the damages which the owners will sustain, are not questions for the determination of the court, but belong, under the constitution, to a jury, unless that mode of assessment is waived. Nor, is it any objection to the relief sought in this case that the plaintiffs might have brought an action for damages. They are entitled to injunction against the threatened invasion of the property rights. That is the primary remedy, long established, and best adapted to the preservation of their rights. They are not required to wait until the threatened injury is done, and then undergo the vexations and expense of a protracted litigation that in the end may afford but incomplete and inadequate relief. It was the primary duty of the railway company, before attempting to take from the plaintiffs, property rights which the constitution guarantees to them, to institute in a proper tribunal the necessary appropriation proceedings to obtain an assessment of compensation and damages to them. The company cannot interpose its violation of that duty, as a defense to the plaintiffs' injunction.

Judgment reversed and judgment for plaintiffs in error for an injunction against the construction and operation of either the said railroad or electric light plant; and, in case the defendants in error have commenced work on either, it is ordered and decreed

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that within thirty days from the entry of this decree they remove all material and obstructions placed in the public highway by them, and restore the said public highway to the condition it was in at the time and before the commencement of said work.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

THE GERMAN MUTUAL INSURANCE COMPANY v.
LUSHEY ET AL.

*Testatrix, having child living, devises all estate to husband—
An after-born child will inherit from mother as heir at law
—Law of wills.*

Where a testatrix, having a child living, devises all her estate to a third person (in this case her husband), without making provision in her will for an after-born child, such after-born child, if it survive the testatrix, by virtue of the provisions of Sec. 5961, Rev. Stat., will inherit from the mother as her heir at law, as if she died intestate, notwithstanding, that by clear and explicit language in the will, such testatrix undertakes to disinherit such after-born child.

(Decided April 22, 1902.)

Error to the Circuit Court of Hamilton county.

In September, 1898, the plaintiff in error filed its petition in the court of common pleas of Hamilton county, to foreclose a mortgage given by George Lushey, September 30, 1892, to secure a note to plaintiff in error, for the sum of ten thousand dollars, payable one year after date, with interest payable semi-annually. This mortgage covered real estate in the city of Cincinnati. Interest was paid on the mortgage to September 30, 1897, after which no further payments were made.

Whatever title George Lushey had in and to the premises so incumbered, rests entirely in the last will and testament of his wife, Carrie Lushey, executed on the 11th day of June, 1872. Harry W. Lushey, a son of the testatrix, answered the petition of the insurance company, plaintiff in error, alleging title in himself to the undivided one-half of the premises described in the mortgage, which title he derived from said Carrie Lushey as one of her heirs at law; and he prayed that his title be quieted as against the insurance company and its claims under said mortgage. On the trial of the case to the court without a jury, the facts were found and conclusions of law stated, as follows:

"That Caroline Lushey, late of Hamilton county, Ohio, being seized of the fee simple title to the premises described in the petition, on the 11th day of June, 1872, made and executed her last will and testament, of which the following is a copy:

"In the name of the Benevolent Father of all, I, Caroline Lushey, wife of George Lushey, of the city of Cincinnati, county of Hamilton and state of Ohio, do make and publish this my last will and testament. I give and devise to my beloved husband, George Lushey, all of my estate, real and personal, of which I may die seized and possessed, to have and to hold the same to myself, his heirs and assigns forever. *Should any child or children, we now having only one, George Gabriel, be born to me hereafter, it shall in no wise alter or revoke this will and testament.* Should my husband, George Lushey's, decease precede my own, it is my will that Julius Benckenstein shall act as trustee of my estate, real and personal, and guardian of my child or children, and I ask the probate court to ratify this appointment. Said trustee shall

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manage said estate as to him may seem advisable for the best interest of my child or children, and shall have full power to sell or convey any portion or all of said estate, real or personal, and shall render an account of his doings as such trustee when the youngest of my children shall come of age and shall then pay or turn over said estate and the proceeds of the balance thereof to my said child or children. Said trustee shall, before entering upon the discharge of said trust, file his bond with two good and sufficient sureties in the probate court of Hamilton county, Ohio, conditioned for the faithful performance of his duties as said trustee in double the appraised value of my estate, real and personal. In such event no executor or administrator shall be appointed, but said trustee shall pay all of the indebtedness of my estate out of the same. I desire that no appraisal shall be made should my husband, George Lushey, survive me, and in that event the said George Lushey shall act as executor of my last will and testament without any bond being required of him, and the said probate court of Hamilton county, Ohio, is requested to ratify said appointment and to direct the omission of any such bond.

In testimony whereof I have hereunto signed my name this 11th day of June, A. D. 1872, at Cincinnati, Ohio.

“CARRIE LUSHEY.

“Attested and subscribed by us as witnesses in presence of Caroline Lushey and of each other, we having seen her subscribe her name to and heard her acknowledge the above as her last will and testament.

“L. W. GOSS,

“GABRIEL BENCKENSTEIN.

"That on the 8th day of March, 1879, the said will was duly admitted to probate and no proceedings were instituted to set aside the said will, and said will is in full force and effect.

"At the time said Caroline Lushey executed her said last will and testament she was the wife of the defendant, George Lushey, and one child, named George Gabriel Lushey, had been born to said Caroline Lushey and George Lushey, and was living at the time said will was executed.

"After executing said will another child, the defendant, Harry W. Lushey, was born to the said Caroline and George Lushey. The said Caroline Lushey died in June, 1878, seized in fee simple of the premises described in the petition, and leaving the defendant, Harry W. Lushey, and his brother George Gabriel Lushey her only children and sole heirs at law, and also leaving the defendant, George Lushey, her husband, surviving her.

"That on the 30th day of September, 1892, George Lushey being in possession of the premises described in the petition executed and delivered to the plaintiff, The German Mutual Insurance Company, a corporation duly organized under the laws of the state of Ohio, for a valuable consideration his promissory note of that date, whereby he promised to pay the German Mutual Insurance Company or order the sum of ten thousand dollars in one year after date at six per cent. interest, interest payable semi-annually.

"That the interest on said note has been paid up to March 30, 1897.

"That said note is due and that no payment has been made thereon.

"That in order to secure the payment of said note said George Lushey, at the time of the execution of

said note, executed and delivered to the German Mutual Insurance Company his certain mortgage deed and thereby conveyed to the said German Mutual Insurance Company the premises set out in the petition.

"That said mortgage deed was on the 30th day of September, 1892, duly recorded in book 652, page 40, of the mortgage records of Hamilton county, Ohio.

"That on or about the first day of February, 1898, the said George Lushey, in consideration of one dollar, executed and delivered his certain deed of general warranty, conveying to his son, Harry W. Lushey, among other property the real estate described in the petition, which deed was recorded February 3, 1898.

"The court finds as conclusions of law that the said Caroline Lushey, by her said will, intended to disinherit the said Harry W. Lushey, but that such intention was contrary to the provisions of Sec. 5961, Rev. Stat., which section provided in terms that where a party has one child then living and executes a will and afterwards a child is born to such person, such afterborn child shall have his share the same as if the testator had died intestate.

"Under this construction it gives to the afterborn child his share in his mother's estate and the child then living receives nothing, the father receiving the other portion."

The court rendered a judgment on the findings against George Lushey, the mortgagor, for the amount of the note and interest, and ordered his undivided half of the premises to be sold, and quieted the title of Harry W. Lushey to the other half.

The motion of the insurance company for a new trial was overruled, and it prosecuted error in the circuit court where the judgment of the common pleas was affirmed.

The case is here on error to obtain a reversal of the judgments of the lower courts.

Mr. Chris Von Seggern and Messrs. Ratterman & Ward, for plaintiff in error, cited the following authorities:

Sedgwick on Statutory Const. Law, 247; *Doyle v. Doyle*, 50 Ohio St., 330; *Rhodes v. Weldy*, 46 Ohio St., 234; 39 Am. Dec., 740; *Bowen v. Howie*, 137 Mass., 527; *Wilder v. Goss*, 14 Mass., 356; *Block v. Block*, 3 Mo., 594; *Hockensmith v. Slusher*, 26 Mo., 237; *McCourtney v. Mathes*, 47 Mo., 533; *Gay v. Gay*, 84 Ala., 38; *Alden v. Johnson*, 63 Iowa, 124; *Williard's Estate*, 68 Pa. St., 327; *Waterman v. Hawkins*, 63 Me., 156; *Hirn v. State*, 1 Ohio St., 15; *Dodge v. Gridley*, 10 Ohio, 173; *Sawyer v. State*, 45 Ohio St., 343; *Goodall v. Brewing Co.*, 56 Ohio St., 257; *Teaff v. Ross*, 1 Ohio St., 469; *Ash v. Ash*, 9 Ohio St., 383; *Terry v. Foster*, 1 Mass., 146; *Mayo v. Boyd*, 3 Mass., 13, 21; *Merrill v. Sanborn*, 2 N. H., 499.

Messrs. Renner, Gordon & Renner, for defendants in error, cited the following authorities:

Rhodes v. Weldy, 46 Ohio St., 234; *Hollingsworth's Appeal*, 51 Pa. St., 518; *Ash v. Ash*, 9 Ohio St., 383; *Evans v. Anderson*, 15 Ohio St., 324; *Chace v. Chace*, 6 R. I., 407; *Trust and Deposit Co. v. Trust Co.*, 36 Fed. Rep., 863; *Gage v. Gage*, 29 N. H. (9 Foster), 533; *Waterman v. Hawkins*, 63 Me., 156; *Walker v. Hall*, 34 Pa. St., 483; *Williard's Appeal*, 68 Pa. St., 327; *Branton v. Branton*, 23 Ark., 569; *Marston v. Fox*, 8 Adolph. & E.; *Holloman v. Copeland*, 10 Ga., 79; *Talbird v. Verdier*, 1 Desaus., 592; *Bowen v. Howie*, 137 Mass., 527; *McCullum v. McKenzie*, 26 Ia., 510;

Grosvenor v. Fogg, 81 Pa. St., 400; *Morgan v. Davenport*, 60 Tex., 230; *Hughes v. Hughes*, 37 Ind., 183, 185; *Carter v. Reddish*, 32 Ohio St., 1.

BY THE COURT: We agree with counsel for plaintiff in error, that the power to dispose of property in this state by will is conferred by statute, and that the authority to make the will is found in section 5914 of the Revised Statutes.

By virtue of this section "Any person of full age and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed." This is an old and general provision, and yet it does not leave to the owner of property a free hand to dispose of property, without limitations and restrictions. The very next section of the wills act, section 5915, places a limitation on the will making power, by providing that where the testator leaves issue of his body or an adopted child, devises and bequests to charitable purposes shall be invalid, unless such will shall have been executed at least one year before the decease of the testator.

The manner of execution of such instrument, and all steps for the probating and recording of the same, as well as the means of executing its provisions, are furnished by statute.

Another notable limitation on testamentary disposition exists in section 4200, Revised Statutes, restricting the entailment of estates by deed or will, and there are other instances of legislative restraint found in our wills act. Very prominent among them is section 5961, which directly bears upon and determines the controversy in this case. It reads:

"Section 5961. [Child reported dead, or born after will made, to have portion of estate.] When a testator, at the time of executing his will, shall have a child absent and reported to be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in the will, the absent child, or the child born after the execution of the will, shall take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate," etc.

The remainder of the section not quoted, relates to the method of ascertaining and supplying to the after-born child his share of the estate. The record in this case shows, and it is stated in the will itself, that when it was executed the testatrix had one child then living—George Gabriel Lushey—and, after its execution she gave birth to another child, Harry W. Lushey—who is the defendant in error. The event of his birth, after the will was made, brought section 5961 into operation, and when the testatrix died, in June, 1878, Harry W. became her heir at law and entitled to one-half of the estate. This is so, by reason of this statute, although the testatrix endeavored to guard against it by express provision, where she said: *"Should any child or children, we having now only one, George Gabriel, be born to me hereafter, it shall in no wise alter or revoke this will and testament."* This indicates that the law of such event was under consideration when the will was drafted, and it may have been then thought, as is now argued for plaintiff in error, that a clear expression concerning an after-born child and her wishes touching it, stated in the will, would avoid the force of section 5961; and we are referred to section 5959, as containing a provision which will permit such a construction. But

section 5959 does not cover a case where there is a child *living* at the time the will is executed, but provides for a very different situation. These two sections are independent but not inconsistent provisions. Each covers a case not covered by the other. Both have been in force as far back as 1840, at least. One of them much longer than that.

Counsel urge that, having contemplated the probability of the birth of another child after the date of her will, and having expressed a determination to disinherit it, her will should stand and that we should so construe section 5961 as to let it have its intended effect. But the language is not a *provision for*, but is one *against* the after-born child.

It seems to us that the open and avowed disregard of the words of the statute is entitled to no higher consideration than a silent omission to mention and provide for such child. One course is no more potent than the other. She could neither suspend nor repeal the law, and it is not within the power of this court to do so. Many cases have been cited from other states construing their statutes on kindred subjects, but they are fruitless here, when we consider the plain and uncompromising language of our own legislation. We do not undertake to give reasons for the difference between section 5959 and section 5961, but it is our duty to enforce each when a case arises to which one or the other applies.

By the terms of the will, the testatrix cut off George Gabriel, the living child, and by the subsequent birth of Harry W. and the death of the testatrix, he inherited one-half of the estate of the mother just as if she had died intestate.

It follows, therefore, that George Lushey, the husband of the testatrix, when he gave the mortgage to

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plaintiff in error, owned but one-half of the premises described in the mortgage, and that the judgment of the court of common pleas was right, and that the circuit court did not err in affirming the judgment.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

BRENZINGER ET AL. v. THE AMERICAN EXCHANGE BANK.

Party granted new trial—On condition of giving bond to secure possible judgment—Bondsmen estopped to deny validity of bond.

When the trial court is of the opinion that a party is not in strict right entitled to a new trial, but grants to such party a new trial on condition that he give bond to pay any judgment which might be recovered on such new trial, and he complies with the condition and has the benefit of the new trial, the parties to such bond are estopped from claiming that such bond is invalid.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Lucas county.

Mr. W. H. A. Read, for plaintiffs in error, cited and commented upon the following authorities:

United States v. Freight Assn., 166 U. S., 290; 15 Enc. Pl. & Pr., 284, 287; *Brown v. Byam*, 59 Ia., 52; *Worth v. Wetmore*, 87 Ia., 62; *Niagara Ins. Co. v. Rodecker*, 47 Ia., 162; *Watson v. Paine*, 25 Ohio St., 340; *Frazier v. Williams*, 24 Ohio St., 625; *Braden v. Hoffman*, 46 Ohio St., 639; *Wellman v. Wellman*, 6 C. D. 61; 9 C. C. R., 72; 4 Am. & Eng. Enc. Law (2 ed.), 629, 674; *Beach on Modern Law of Contracts*, Sec. 1534; *Kent's Com.*, 476; *Haws v. Marchant*, 1 Curt.

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(U. S.), 140; *Whitehead v. Governor*, 6 Port. (Ala.), 343; *Brown v. Brown*, 37 Minn., 128; *Hargrave v. Boero*, 23 S. W. Rep., 403; *Anderson v. Railway Co.*, 54 N. Y., 335; *Johnson v. Taylor*, 5 Smed. & Mar. (Miss.), 92; *Howell v. Mills*, 53 N. Y., 322; *Ancoin v. Guillot*, 10 La. An., 124; *Casey v. Malidore*, 53 Pac. Rep., 60; *Bonnett v. Townsend*, 17 N. Y. Supp., 566; *Honduras v. Soto*, 112 N. Y., 310; 2 Hill's Am. Code, Sec. 400; *Yates v. Guthrie*, 119 N. Y., 420; *Halsey v. Flink*, 15 Abb. Pr., 367; *Commonwealth v. Wistar*, 142 Pa. St., 373; *People v. Cabannes*, 20 Cal., 525; *Railway Co. v. McClure*, 58 Kan., 109; *Bank v. Benjamin*, 61 Wis., 512; *Heffner v. Scranton*, 27 Ohio St., 579; *Thompson v. Buffington*, 7 Dec., 557; 7 N. P., 134; *Railroad Co. v. Lee*, 32 S. W. Rep., 249.

Mr. U. G. Denman and Messrs. Smith & Beckwith, for defendant in error, cited and commented upon the following authorities:

Hilliard on New Trials, 6, 14, 15; *Heffner v. Scranton*, 27 Ohio St., 579; *Haggin v. Christian*, 1 A. K. Marsh. (Ky.), 430; *Itwin v. Riley*, 68 Ga., 605; *Prunty v. Mitchell*, 30 Gratt. (Va.), 247; *Gaines v. Dailey*, 1 J. J. Marsh. (Ky.), 479; *Brentam v. Musgrove*, 25 Ill., 152; 3 Harrison (N. J.), 47; *Jackson v. Eddy*, 2 Cow., 598; *Dean v. King*, 22 Ohio St., 118, 134; *Fenn v. Railway Co.*, 13 S. W. Rep., 273; *Johnson v. Taylor*, 3 Smed. & M., 92; *Ex parte Beavers*, 34 Ala., 71; *Casey v. Malidore*, 53 Pac. Rep., 60; *Brooks v. Railway Co.*, 110 Cal., 173; *Rice v. Gashire*, 13 Cal., 53; *Bulkin v. Ehret*, 20 N. Y., 731; *Stokes v. Stokes*, 56 N. Y., 637; *Battelle v. Connor*, 6 Cal., 140; *Prunty v. Mitchell*, 30 Gratt., 247; *Stephens v. Broadmax*, 5 Ala., 258; *Hoyt v. Murphy*, 23 Ala., 456; *Dewey v. Leonhardt*, 37 Mo. App., 517; *Ferguson v.*

Gilbert, 16 Ohio St., 88; *Smith v. Bailey*, 26 Ohio St., 1; *Durrell v. Boyd*, 9 Ohio St., 72; *Sedan v. Church*, 29 Kan., 190; *Railroad Co. v. Rahmann*, 22 Ohio St., 446; *Haldeman v. Johnson*, 54 Pac. Rep., 507; *Prunty v. Mitchell*, 30 Gratt., 251; *Garoutte v. Holey*, 38 P. R., 194; *Johnson v. Johnson*, 47 S. W. Rep., 883; *Knight v. State*, 54 Ohio St., 365; *Lainey v. Bradford*, 4 Rich., 1; *Edwards v. Lewis*, 18 Ala., 494; *Thwaites v. Sainsbury*, 7 Bing., 437; 1 *Graham & Waterman on New Trials*, 604; *Burrall v. Acker*, 23 Wend., 606; *Miller v. Rhoades*, 20 Ohio St., 494; *Mays v. Joseph*, 34 Ohio St., 22; *Martin v. Bolenbaugh*, 42 Ohio St., 508.

BY THE COURT: In an action by the defendant in error against the plaintiff in error, William F. Brenzinger, a verdict was rendered for the bank. Brenzinger made a motion for a new trial. The journal entry as to the motion is as follows: "This cause coming on for hearing on the motion of the defendant for a new trial, the court on consideration thereof ordered that said motion be overruled, unless said defendant give bond to the plaintiff in the sum of five hundred dollars (\$500) with sufficient surety, to the approval of the court, conditioned that said defendant will pay and satisfy any judgment which said plaintiff may recover against said defendant in said action." The bond was given, Carrie K. Brenzinger being security thereon, and a new trial was thereupon awarded. On the new trial the bank recovered a judgment against Brenzinger, and being unable to collect the same from him, brought suit on the bond. Both defendants demurred to the petition on the ground that it did not state a cause of action. The demurrer was overruled and judgment was rendered

by the court of common pleas for the plaintiff, which was affirmed by the circuit court.

It does not appear in this case that William F. Brenzinger was entitled to a new trial in the original action. On the contrary it appears that the court overruled his motion for a new trial and that he did not predicate error upon that judgment, but allowed it to stand. The court, however, gave him the opportunity to have a new trial on condition that he would give bond for the payment of such judgment as might be obtained against him on such new trial. He did not complain of this, gave the bond and had his opportunity under the new trial, and having had the fruits of his acceptance of the condition, now seeks to repudiate his bond. We think that the plaintiffs in error are not only bound by their agreement under the circumstances; but that the court having found that Brenzinger was not in strict right entitled to a new trial, might in its discretion allow a new trial upon the reasonable condition named, at least if the other party did not object. The judgments of the circuit court and of the court of common pleas are

Affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK
and PRICE, JJ., concur.

HUSTON v. THE TRAVELER'S INSURANCE COMPANY.

Accident insurance policy—Restriction as to entering or leaving moving trains—Plaintiff injured when about to step on car—Application of rule—Personal injury—Construction of contracts.

An accident policy contained this exception: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as motive power." The insured was walking along a railroad track, the ground being slippery and icy, when a freight train overtook him, going slowly, and it occurred to him that he would step on the caboose and ride, and as he was about to step on, but before he had touched the car, he slipped and fell, and his left foot was crushed by the hind wheels: *Held*, that what he did after the purpose to step on the car caused him to change his conduct from that of walking along the track, to that of making preparation to step on the car, was within the exception, whether he had caught hold of the car or not.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Summit county.

The action was brought by the plaintiff in error, also plaintiff below, against the insurance company to recover one-third part of a \$5,000 accident policy, the injury caused by the accident having resulted in the amputation of the left foot of the plaintiff.

The material facts are that he was walking along the west side of the track of the Erie Railway at Akron going north about seven o'clock in the evening of January 21, 1897, when he was overtaken by a freight train going in the same direction, a little faster than he could walk, and as the caboose was nearing him he looked around and it occurred to him that he would step onto the caboose and ride up to Exchange street and step off, and as he was about to step on, but before he had taken hold of the caboose

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in any manner, but while he was expecting to do so, he slipped and fell, the ground being icy, and in falling his left foot got under the rear wheels and was crushed.

The policy contained the following:

"This insurance does not cover * * * violating law; voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; being in or on any such conveyance not provided for the transportation of passengers; being on a railway roadbed."

The court charged the jury as follows:

"If he intended to take this car and had started to reach it, and before actually reaching the point where he could enter, and had not taken hold of or was clinging to the car in any manner or attempting to enter it, but slipped upon the ground in such a manner that his foot was crushed by the wheel of the passing car, he would not be within the terms of this exception."

The jury returned a verdict in favor of the plaintiff, a motion for a new trial was overruled, and judgment entered upon the verdict. Proper exceptions were saved wherever necessary.

The circuit court reversed the judgment on the ground that it regarded the above charge as erroneous. Thereupon the plaintiff came here seeking the reversal of the circuit court and an affirmance of the common pleas.

Messrs. Musser & Kohler and Mr. F. H. Waters,
for plaintiff in error.

Messrs. Allen & Cobbs, for defendant in error.

BY THE COURT: The part of the charge complained of was erroneous, and the circuit court was right in reversing the judgment of the common pleas.

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While the meaning of such clauses in an accident policy should be construed with fair strictness against the company, there should be no strained or unnatural construction put upon the acts of the insured to save such acts from coming within such exceptions.

In this case the plaintiff was walking along the railway on slippery icy ground, and it occurred to him that he would step upon the caboose, and he thereupon acted upon that intention, and changed from walking along the track on the slippery ground, to making preparation to step on the caboose, and from the moment that he so changed his conduct of walking along the track, and took on the conduct of attempting to step on the caboose, that is, of trying to enter the caboose, and whatever he did in his preparation to so step upon the caboose was an act in trying to enter it, and was within the exception, whether he had then taken hold of the car or not. The getting into position on a slippery place to grab hold of the caboose as it would come along by his side, would be more likely to cause a fall, than the taking hold of the handle bars of the caboose itself.

With this view of the law it will be seen not only that the reversal was right, but that several other parts of the charge were wrong.

Judgment affirmed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

HARMON v. STATE OF OHIO.

Protection of life and property from incompetency of engineers, etc.—Act of March 1, 1900 (94 O. L. 33)—Act invalid as in conflict with section 2 of bill of rights, and section 1 of article 2—Constitutional law.

The act of March 1, 1900, 94 O. L., 33, entitled "An act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named," known as the Roberts Law, is in conflict with the common welfare clause of the constitution, and also in conflict with section 2 of the bill of rights, and section 1 of article 2, and is therefore unconstitutional and void.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Butler county.

E. H. Harmon, plaintiff in error, having been appointed and qualified district examiner, under the act of March 1, 1900, 94 O. L., 33, known as the "Roberts Law," entitled "An Act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named," the prosecuting attorney of Butler county filed his petition in the circuit court of that county in *quo warranto* to oust said Harmon from said office, claiming said act to be unconstitutional.

The circuit court held the act to be unconstitutional and rendered judgment of ouster, and thereupon Mr. Harmon filed his petition in error in this court, seeking to reverse the judgment of the court below.

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Mr. J. M. Sheets, attorney general, and *Mr. S. W. Bennett* and *Mr. J. E. Todd*, for plaintiff in error, cited and commented upon the following authorities:

Cincinnati v. Steinkamp, 54 Ohio St., 284; 45 W. L. B., 443; *Whitney v. Gill*, 8 Circ. Dec., 450; 15 C. C. R., 648; *Blair Brick Co. v. Waltz*, 8 Circ. Dec., 742; 15 C. C. R., 718; *Sutherland on Stat. Interp.*, Secs. 175, 176; *State v. Smith*, 48 Ohio St., 211; 4 Blackstone Com., 162; *Cooley's Const. Limit.*, 572; *Thorpe v. Railroad Co.*, 27 Vt., 140; *State v. Gardner*, 58 Ohio St., 599; *Adler v. Whitbeck*, 44 Ohio St., 539; *Senior v. Ratterman*, 44 Ohio St., 661; *State v. Turnpike Co.*, 37 Ohio St., 481; *State v. Nelson*, 52 Ohio St., 88; *Barbier v. Connolly*, 113 U. S., 27; *Railroad Co. v. Pennsylvania*, 134 U. S., 232; *Brannon's 14th Amendment*, 168; *Slaughter House Cases*, 83 U. S. (16 Wall.), 36; *Railroad v. Mathews*, 165 U. S., 1; *Converse, In re*, 137 U. S., 624; *Rahrer, In re*, 160 U. S., 545; *France v. State*, 57 Ohio St., 1; *Railroad Co. v. Commissioners*, 1 Ohio St., 88; *Railroad Co. v. Smith*, 70 Ga., 694; *People v. Brooks*, 101 Mich., 98; 6 Am. & Eng. Ency. Law (2 ed.), 1029; *Express Co. v. Railroad Co.*, 111 N. Car., 463; *Sinks v. Reese*, 19 Ohio St., 306; *Renner v. Bennet*, 21 Ohio St., 431; *State v. Lysight*, 11 Re., 518; 27 W. L. B., 238; *Moore v. State*, 48 Miss., 147; *Metropolitan Board of Excise v. Barry*, 34 N. Y., 663; *Butchers' Union v. Crescent City Co.*, 111 U. S., 746; *Railroad v. Kercheval*, 16 Ind., 84; *Railroad Co. v. McClelland*, 25 Ill., 140; *Cooley's Const. Lim.*, 723; *Mobile v. Kimball*, 102 U. S., 691; *Smith v. Alabama*, 124 U. S., 465; *Railroad Co. v. Alabama*, 128 U. S., 96; *Railroad Co. v. Lowe*, 114 U. S., 525; 2 Story Const., Sec. 1219; *Railway Co. v. McGlinn*, 114 U. S., 542.

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Mr. Warren Gard, prosecuting attorney; *Mr. James E. Neal* and *Mr. W. M. Ampt*, for defendant in error, cited and commented upon the following authorities:

Rodgers v. Adsit, 73 N. W. Rep., 381; *Welton v. Missouri*, 91 U. S., 275; *Walling v. Michigan*, 116 U. S., 446; *State v. Gardner*, 58 Ohio St., 599; *State v. Hinman*, 65 N. H., 103; *State v. Pennoyer*, 65 N. H., 113; *Fraser v. McConway*, 82 Fed. Rep., 257; *Tiedeman P. P.*, Sec. 85; *Beebe v. State*, 6 Ind., 501; *State v. Hancock*, 48 Atl. Rep., 1023; *State v. Gravett*, 65 Ohio St., 289; *Williams v. Donough*, 65 Ohio St., 499; *Shawnee Co. (Commrs.) v. Carter*, 2 Kan., 115; *Sedgwick on Stat. and Const. Law*, 177; *Hengst v. Cincinnati*, 9 Dec., 730; 7 N. P., 1; *Plymouth v. Schultheis*, 35 N. E. Rep., 12; *Bessonies v. Indianapolis*, 71 Ind., 189; *Richmond v. Dudley*, 129 Ind., 112; *Walsh v. Denver*, 10 Colo., 407; *Yick W. v. Hopkins*, 118 U. S., 356; *Lumber Co. v. Cicero*, 51 N. E. Rep., 758; *St. Louis v. Packing & Prov. Co.*, 141 Mo., 375; *Eureka v. Wilson*, 15 Utah, 67; *Maxwell v. State*, 40 Md., 273; *United States v. Rider*, 50 Fed. 406; *United States v. Bridge Co.*, 45 Fed. 178; *Railroad v. People*, 175 Ill., 359; *United States v. Ross*, 5 Appeal Cases, 241.

BY THE COURT. The only question involved in this case is the constitutionality of what is known as the —
“Roberts Law.”

The act provides for the appointment of a chief examiner by the governor with the advice and consent of the senate, and said chief examiner with the approval of the governor, to appoint six district examiners, each to serve in a district to be formed by the chief examiner.

Section six of the act is as follows:

"Any person who desires to act as steam engineer, shall make application to any district examiner of steam engineers for a license so to act, upon a blank furnished by the engineer, and if, upon examination, the applicant is found trustworthy and competent, a license shall be granted him, to have charge of, or to operate any steam plant. Such license shall continue in force for one year, unless after proper hearing it is revoked for intoxication or other sufficient cause, the said license to be renewed yearly."

By this section the examiner is made the exclusive judge as to whether an applicant is trustworthy and competent. No standard is furnished by the general assembly as to qualification, and no specifications as to wherein the applicant shall be trustworthy and competent, but all is left to the opinion, finding and caprice of the examiner. He is the autocrat with unlimited discretion, without rules prescribing the qualifications of applicants for license, only so that he finds them trustworthy and competent. There being six districts and six examiners, each may have his own notions as to what shall constitute an applicant trustworthy and competent, and so there may be in the first instance as many different standards in the state as there are examiners, whereas the standard should be uniform throughout the state. True, by section nine an appeal is given to the chief examiner from the action of refusing or revoking a license, but here again the power of the chief examiner is supreme and without having rules for his guidance prescribed by the general assembly; the only provision being that if upon investigation he finds that the district examiner was justified in refusing or revok-

ing such license, he shall sustain him, but otherwise he shall order such license to be given.

Thus allowing the examiner of a district to, in effect, make the law for his district, limited only by his will as to what shall constitute the standard of the qualification of engineers, is granting legislative power to such examiner, and the appeal to the chief examiner does not change the matter.

By section one of article two of the constitution all legislative power is vested in the general assembly, and this power cannot be delegated to individuals or officers. *Mathews v. Murphy*, 63 S. W. Rep., 785.

Said section six of the Roberts law is therefore in conflict with said section one of article two of the constitution, and is void.

It is urged that this is not legislative but administrative power; but this cannot avail. The constitution does not recognize such a power as administrative power. The constitution provides only for legislative, executive and judicial powers, and what is denominated in some other states as administrative power falls in this state within one of the three great powers recognized by our constitution, legislative, executive and judicial. This court has in several opinions spoken of certain powers as being administrative, but no warrant is found therefor in the constitution, and no necessity exists for such a power, as all powers are included in the legislative, executive and judicial.

Section seven of the act is as follows:

"Any engineer who has been employed continuously as a steam engineer in the state of Ohio for a period of three years next prior to the passage of this act, and who files with his application a certificate of such fact under oath, accompanied by a certificate from his em-

ployer or employers verifying the same, or who holds a license issued to him under any ordinance of a municipal corporation of this state, shall be entitled to a license without further examination. Any person to whom a license is issued under the provisions of this act shall at the expiration of one year from the date thereof be entitled to a renewal thereof for one year, unless, in the opinion of the district examiner, of his district, such renewal should be refused, in which event such person shall have the right to appeal to the chief examiner provided for in Section 9."

To escape an examination, and yet obtain a license under this section, the applicant must have been a steam engineer in the state of Ohio for three years next prior to the passage of the act, or hold a license under an ordinance of a municipality in this state. This section confers the privilege of obtaining a license without examination on all engineers who were continuously employed as such for three years next prior to the passage of the act no matter how incompetent they may have become by reason of age, habits or other causes. And no matter how competent an engineer may be by reason of long service, if he has not been employed continuously for three years before the passage of the act, if he is short a month or more in the three years, he is denied the privilege of obtaining a license without examination. This three year provision is clearly arbitrary and without reason. It is arbitrarily forming a favored class and is in conflict with section two of the Bill of Rights which guarantees equal protection and benefit; and it is also in conflict with the purpose for which the constitution was established, which was to promote our common welfare. This section of the act is to promote the welfare of a particular three-year class,

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instead of the common welfare of all. The section is therefore unconstitutional, and the two sections six and seven are so interwoven with the whole act as to be inseparable, and therefore the whole act is unconstitutional.

Judgment affirmed.

BURKET, SPEAR and DAVIS, JJ., concur.

HUNT v. BODE, ASSIGNEE, ET AL.

Transfer of warehouse receipt or chose in action—Valid without actual delivery—As collateral security for loan—Pledgor requests first pledgee to transfer security to second creditor—Assignment of pledgor within ninety days after transfer of security—Not fraudulent—Application of Sec. 6343, Rev. Stat.

1. A written pledge or transfer of an interest in warehouse receipts, or choses in action to secure a debt, is valid, without actual or manual delivery, where such receipts or choses in action are being held by another creditor on pledge as collateral security for a loan of money made by him to the same pledgor, or transferer, the second pledge or transfer being equivalent to actual delivery of the property pledged or transferred; and a request by the pledgor or transferer to his first pledgee, that when his debt is paid he deliver the collateral to his other creditor, constitutes sufficient possession of the collateral by such other creditor.
2. If the pledgor or transferer file a deed of assignment within ninety days after making such pledge or transfer to secure the second creditor, the same will not be deemed and held to be fraudulent and void as to the assignee under the provisions of Sec. 6343, unless the pledge or transfer was in contemplation of insolvency; or, with a design to prefer one or more creditors to the exclusion in whole or in part of others; or, with intent to hinder, delay or defraud creditors.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Hamilton county.

The controversy between these parties was first litigated in the court of insolvency of Hamilton county,

and from its judgment and orders an appeal was taken to the court of common pleas, where the case was tried by that court on an agreed statement of facts, from which statement it appears, that H. F. Stothfang, prior to April 16, 1898, had for several years been indebted to one Dibowski, for borrowed money, in the sum of one thousand dollars for which he held the promissory note of said H. F. Stothfang. On April 16, 1898, Stothfang paid to Dibowski the interest due, and gave a new note for the principal sum, due in one year, signed by himself, F. H. Stothfang and Louisa Stothfang, and before delivery it was endorsed by defendant in error, Henry Dieckmann. This note was not paid when it matured, and after being protested for non-payment, Dibowski threatened to bring suit against the makers and endorser, and to prevent suit against him, and to take up the note on which he was liable as endorser, by a mutual arrangement between all the parties, defendant in error Henry Dieckmann, in satisfaction of the former note, gave his individual note to Dibowski for the one thousand dollars due one year after date with six per cent. interest per annum, and secured its payment by mortgage on real estate. This note and the mortgage are dated May 12, 1899. As a consideration for the giving of said note and mortgage by Dieckmann to Dibowski, H. F. and F. H. Stothfang executed and delivered to Dieckmann the following instrument:

"\$1,000.00. Cincinnati, May 12th, 1899. One year after date we promise to pay to Henry Dieckmann or order, one thousand dollars, for value received, payable at the Atlas National Bank, with interest at six per cent. per annum, having deposited or pledged as collateral security for the payment of this note the same warehouse receipts for whiskey now in the pos-

session of the Atlas National Bank and pledged with said bank as collateral security for loans or their renewals of said loans, and after the payment of said loans or their renewals to the Atlas National Bank, then the balance of said warehouse receipts are to be held by the said Henry Dieckmann as collateral security to his note. And we hereby give to the holder hereof full power to sell or collect at his expense all or any portion thereof, at any place, either in Cincinnati or elsewhere, at public or private sale, at holder's option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to him any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of said sale. (Signed) H. F. Stothfang, F. H. Stothfang."

The Atlas National Bank, on the 15th day of May, 1899, was served with a copy of the above instrument as shown by the following writing:

"Cincinnati, Ohio, May 15th, 1899. The Atlas National Bank, City. Dear Sirs: I attach hereto a copy of a promissory note given on May 12th, 1899, to Henry Dieckmann and signed by myself and brother. The note explains itself. You are to keep possession of the warehouse receipts and the insurance policies for the whiskey which you have as collateral security for loan to me and after these loans are fully paid up to you, the balance of the warehouse receipts are to be turned over to Henry Dieckmann or to O. J. Renner, his attorney, to be held by them as collateral security for the note hereto attached. The insurance policies on this whiskey are also to be turned over when your claim is fully paid. Yours very truly, H. F. Stothfang."

H. F. Stothfang for a year or more, prior to the transaction, was in partnership with his brother, F. H. Stothfang, and they did business under the firm name of H. F. Stothfang & Brother, but said partnership was dissolved and H. F. continued the business, assuming its liabilities and taking its assets.

At the time of the execution of the note signed by Dieckmann and prior thereto H. F. Stothfang was insolvent, and so continued insolvent, but Dieckmann had no knowledge of said insolvency.

On the the 7th of August, 1899, H. F. Stothfang made a general assignment under the laws of the state of Ohio for the benefit of creditors, to August H. Bode, and the deed of such assignment was filed in the court of insolvency of Hamilton county on the same day, and the assignee accepted the trust and duly qualified.

The warehouse receipts representing said whiskey, being then in the possession of the Atlas National Bank, were sold by the assignee and realized about \$2,300, leaving in the hands of the assignee at the time, a balance of \$1,300, after having paid the Atlas National Bank in full under order of the insolvency court.

A further fact agreed upon is:

"That at the time the assignee sold the whisky under the order of the insolvency court, the bank having the warehouse receipts in its possession declined to turn them over to the assignee until the bank had its claim paid. The bank further declined to turn them over to the assignee until Dieckmann or his counsel consented to it, the bank having accepted the notice sent by Dieckmann's counsel. Dieckmann's counsel declined to consent to the turning over of the warehouse receipts at that time, and immediately went to

the insolvency court, and that court made an entry before the warehouse receipts were turned over to the assignee and purchaser, reserving all the rights of Dieckmann."

Whatever right Dieckmann had or has were preserved by an entry made by the court of insolvency, a copy of which is as follows:

"It appearing to the court that upon a lot of 165 barrels of whiskey sold by the assignee herein, the Atlas National Bank, Henry Dieckmann and C. Rodenberg claim liens for \$1,063, \$1,025 and \$248, respectively, and it further appearing that the warehouse receipts to said whiskey are in the possession of said Atlas National Bank and that it becomes necessary to deliver said warehouse receipts to said assignee to complete said sales made by him under the order of this court, it is hereby adjudged that said delivery shall in no wise prejudice and interfere with the rights that said Dieckmann and Rodenberg had previous to said sale and delivery in said goods or warehouse receipts, or to the right to the possession thereof, and that all their rights are fully preserved."

Dieckmann claims to be entitled to payment in full of his note with interest out of the proceeds of the sale of said warehouse receipts in the hands of the assignee, which claim to be so paid is denied by the creditors of H. F. Stothfang, claiming that Dieckmann is entitled to share in the proceeds only as a general creditor, and that the above arrangement between him and the assignor is void under section 6343, Revised Statutes.

On these facts the court of common pleas found for Dieckmann, and made an order for his payment accordingly. A new trial was refused and error was prosecuted in the circuit court, where the judgment

of the common pleas was affirmed, and August Hunt, a creditor of the assignor prosecutes error in this court, to obtain a reversal of the judgments of the lower courts.

Mr. Charles F. Williams; Mr. Henry Woost and Mr. C. A. Groom, for plaintiff in error.

Two points are raised for decision in this cause, viz.: When the liability of a surety attaches, and the construction of section 6343, Revised Statutes.

It is of the essence of a pledge that there shall be an actual delivery of the thing pledged to the pledgee. *Collins v. Buck*, 63 Me., 459; *Beeman v. Lawton*, 37 Me., 543; *Casey v. Cavaroc*, 96 U. S., 467.

The securities claimed to have been pledged to the Credit Mobilier remained in the possession and control of the bank until the time of its failure. Up to that time they were not in such condition as the law requires for a pledge. The placing them in such a condition afterwards, by Cavaroc's removing them from the bank at the time of its failure, was, in fact, an attempt to create a pledge then, by assuming the possession requisite thereto. *Casey v. Bank*, 96 U. S., 492; *Bank v. Stubbs*, 6 Mass., 422; *Jones on Pledges*, Sections 23 and 26.

The delivery must be such as would be requisite to transfer the property in the same chattels in case of a sale of them. *Jones on Pledges*, Sec. 23; *Pinkerton v. Railroad*, 42 N. H., 424; *Corbett v. Underwood*, 83 Ill., 324.

If for any reason the article sold is not quite identified, or something more remains to be done for the purpose of completing, separating, or identifying, etc., then the sale is not quite complete and title does not pass, because there is no equivalent to delivery

in contemplation of law. *Ormsbee v. Machir*, 20 Ohio St., 295; *Woods v. McGee*, 7 Ohio (pt. 2), 127; *Oil Co. v. Hughey*, 56 Pa. St., 322; *Phelps v. Willard*, 16 Pick., 29; *Golder v. Ogden*, 15 Pa. St., 528.

An agreement to pledge is not good against the pledgor's assignee, in insolvency. *Nisbit v. Bank*, 12 Fed. Rep., 686; *Seymour v. Hendree & Smalley*, 54 Fed. Rep., 563; *Christian v. Railroad*, 133 U. S., 233; *Insurance Co. v. Olmsted*, 33 Conn., 476.

An agreement for a pledge raises no privilege. *Casey v. Schuchardt*, 96 U. S., 494.

"The surety is an original promisor and debtor of his principal from the beginning." Brandt on Suretyship, sections 1 and 207; Bump on Fraudulent Conveyances, section 503; *Jones v. Leeds*, 10 Dec., 173; 7 N. P., 480; *McCann v. Hill*, 85 Ky., 574; *Corn v. Sims*, 3 Metc., 391; *Thompson v. Heffner*, 11 Bush, 353.

A stranger endorsing his name in blank on the back of a negotiable promissory note, before, or at the time it takes effect, is presumed to be a surety for its payment and is held accordingly. *Bright v. Carpenter*, 9 Ohio, 139; *Seymour & Co. v. Mickey*, 15 Ohio St., 515; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St., 596.

A party bound by a contract whereof he may become liable to the payment of money, although his liability may be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors. *Young v. Heermans*, 66 N. Y., 374; *Van Wyck v. Seward*, 18 Wend. (N. Y.), 375; *Shontz v. Brown*, 27 Pa. St., 123; *Cook v. Johnson*, 12 N. Y. Eq., 52; *Bibb v. Freeman*, 59 Ala., 612; *Jenkins v. Lockhard*, 66 Ala., 381.

It follows logically from the foregoing that the person to whom such debtor is bound is a creditor.

A surety, though his liability is only contingent, is a creditor of his principal. *Atkinson v. Tomlinson*, 1 Ohio St., 237; *Harkrader v. Leiby*, 4 Ohio St., 602.

"It has been determined that the statute (act of March 14, 1838—Swan's Statutes, section 717) does not affect a mortgage, given by an insolvent debtor to secure the debt of one of his creditors, or to indemnify him against a liability, by endorsement or otherwise, assumed for the benefit of the debtor; although it may have the effect to prefer such creditor, and deprive others of the ability to obtain satisfaction of their claims." *Pendery v. Allen*, 50 Ohio St., 121; *Sargent v. Salmond*, 27 Me., 539; *Choteau v. Jones*, 11 Ill., 300, approved in *Hatfield v. Merod*, 82 Ill., 113; *Howe v. Ward*, 4 Greenl. (Me.), 195; *Carlisle v. Rich*, 8 N. H., 44; *Rice v. Southgate*, 16 Gray, 142.

A surety is a creditor of his principal from the time the obligation is entered into. *Sargent v. Salmond*, 27 Me., 539; *Thompson v. Thompson*, 19 Me., 244; *Sexton v. Wheaton*, 1 American Leading Cases (Hare & Wallace's 5th ed.), 42; *Williams v. Banks*, 11 Md., 242; *Pennington v. Seal*, 49 Miss., 525.

The date when the agreement or obligation comes into existence governs. *Van Wyck v. Seward*, 18 Wend., 375; *Woodbridge v. Gage*, 68 Ill., 157.

A transfer of money or property by an insolvent principal to his surety is an attempt to prefer. *Elliott v. Harris*, 9 Bush (Ky.), 237.

Firm property appropriated to the individual debts of the members of the firm, with the consent of all the partners, and in the absence of fraud, becomes the individual property of the partner or partners. *Sigler*

v. *Bank*, 8 Ohio St., 511; *Miller v. Estill*, 5 Ohio St., 508; *Saunders v. Reilly*, 105 N. Y., 12.

If a creditor goes beyond collecting or securing his own debt and attempts to secure any other or becomes bound to account to, or is trustee for any other creditor, the statute enlarges the trust so as to destroy his preference, and causes the fund or property inure to the benefit of all creditors equally. *Bloom v. Noggle*, 4 Ohio St., 45; *Dickson v. Rawson*, 5 Ohio St., 218.

There was no valid pledge of the receipts to Henry Dieckmann, and consequently he can not claim a preference.

The delivery must be sufficient to transfer the property in case of a sale of the same chattels. Jones on Pledges, Sec. 23; *Pinkerton v. Railroad*, 42 N. H., 424.

Where part of an undivided lot of goods is sold, and an order is given for its delivery, there must be some act of selection under the order before the delivery is complete and the title passes. *Ormsbee v. Machir*, 20 Ohio St., 295; *Rochester Oil Co. v. Hughey*, 56 Pa. St., 322; *Phelps v. Williard*, 16 Pick. (Mass.), 29; *Golder v. Ogden*, 15 Pa. St., 528.

A contract for the sale of an unascertained balance would never in law pass title to goods, consequently by applying the rule stated above there was here no sufficient delivery to perfect a pledge. Therefore, since Henry Dieckmann did not have the receipts by virtue of a valid pledge, he can not claim a lien on them, and can not hold them as against the general creditors of Henry F. Stothfang.

Having neglected to take a mortgage and have it filed for record within the prescribed time, the defendant in error, Henry Dieckmann, can not claim a

lien, since those who seek a privilege under the statute must fully comply with its provisions. *Cross v. Carstens*, 49 Ohio St., 548.

Again the debt was not created simultaneously with the giving of the security.

A third person who signs his name in blank on the back of a promissory note, before the same is delivered to the payee, becomes a surety of the maker for the payment of the note. *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St., 596, and a surety, though his liability is only contingent, is a creditor of his principal; *Atkinson v. Tomlinson*, 1 Ohio St., 237; *Sargent v. Salmon*, 27 Me., 539; *Hatfield v. Merod*, 82 Ill., 113; *Rice v. Southgate*, 16 Gray (Mass.), 152. And he becomes a creditor of his principal at the time the obligation is entered into. *Thompson v. Thompson*, 19 Me., 244; *Woodbridge v. Gage*, 68 Ill., 157.

A surety taking security for his indemnity subsequent to his becoming bound as such, is not protected by the exception in the statute in favor of a creditor whose debt is created simultaneously with the execution of the mortgage. *McCann v. Hill*, 85 Ky., 574.

Messrs. Renner, Gordon & Renner, for defendant in error.

First—Was there a valid pledge?

The warehouse receipts having been pledged to the Atlas National Bank to secure the payment of its claim, and secondly, to Henry Dieckmann to secure the payment of his claim for the purpose of protecting Dieckmann, Dieckmann had constructive possession of the warehouse receipts, and the bank, having accepted the written notice of the pledging of said ware-

house receipts to said Dieckmann, acted simply as the agent of Dieckmann.

Jones on Pledges, Sec. 34.

Second—Do sections 6343 and 6344, Rev. Stat. apply?

We contend that the relation of debtor and creditor between Stothfang and Dieckmann did not arise until Dieckmann, at Stothfang's request, executed and delivered to Dibowski his note and mortgage in part payment of the note on which Dieckmann had been surety, and that the pledging of the warehouse receipts to Dieckmann was simultaneous with the arising of said relation of debtor and creditor, and that therefore said sections do not apply.

A surety does not become a creditor of his principal until he pays the note endorsed by him. *Lumber Co. v. Guy*, 40 Conn., 163.

The quotation in brief for plaintiff in error, cited from Brandt on Suretyship, Sec. 1, "The surety is an original promisor and debtor of the principal from the beginning," should read, "He is an original promisor and debtor from the beginning," leaving out the words "of his principal," which are not in said section, can not be put there by implication, and their slipping into said citation in the brief of plaintiff in error can only be explained by his counsel.

The quotation defines the relation between the surety and creditor and has no reference to the relation between the surety and principal.

So a conveyance made by the principal to the surety in consideration of an agreement by the surety to pay the debt, is valid as against the creditors of the principal. Brandt on Suretyship, Sec. 247; *Kendall v. Baltis*, 26 Mo. App., 411.

And in the case last cited it was held that such conveyance was good even though the principal may have intended to hinder and delay creditors, provided the surety did not participate in his principal's intent.

When does the liability of a surety arise?

It is, in all cases, essential, before the surety can be called upon to fulfill his engagements, that the principal debtor shall have made default. Thus, if the alleged default were owing to the creditor's misconduct, the surety will not be held liable. Again, if the principal debtor has not made default at all, the surety is not liable. DeColyar's Law of Guarantees, and Principal and Surety (2 Eng. ed.), p. 146.

It is admitted that the security was taken by Dieckmann in good faith, without knowledge of the insolvency of his principal at the same time that he took up the note upon which he was surety. There was no contemplation of insolvency, or design to prefer a creditor, with intent to hinder, delay or defraud creditors as contemplated by said sections.

These two sections contained substantially the same provisions against sales and transfers by insolvent debtors as those contained in the sections as amended, and the courts have uniformly held that a creditor may secure himself when, in doing so, he deals with an eye single to his own interest. *Pendery v. Allen*, 50 Ohio St., 121; *Cross v. Carstens*, 49 Ohio St., 548; *Stothfang, In re*, 11 Circ. Dec., 103; 20 C. C. R., 275.

The case of *Jones v. Leeds*, 10 Dec. 173; 7 N. P., 480, cited by counsel for plaintiff in error, sustains our contention, for in that case the court gave the grantee a lien on the property conveyed to her, for the amount paid by her on account of her grantor's liabil-

ity, and held the conveyance fraudulent only as to the amount in excess, the consideration for the conveyance being held inadequate.

PRICE, J. There are two questions presented in the record for our determination, which are:

1. The Atlas National Bank, having in its possession certain warehouse receipts for a stock of whiskey given it by H. F. Stothfang in pledge as collateral for a loan of money made to him by the bank, could the pledgor make another valid pledge or a transfer to Dieckmann of an interest in the same receipts, without any change of possession, as collateral security for a debt due him from the pledgor?

2. If the pledgor filed a deed of general assignment for the benefit of creditors within ninety days after the making of the second pledge or transfer, is such pledge or transfer void under the provisions of section 6343, Revised Statutes?

1. The facts agreed upon show that H. F. Stothfang, for several years prior to the transaction involved, had been indebted to one Dibowski in the sum of one thousand dollars and accruing interest, and that on the last note for this debt, Dieckmann had become liable as surety or endorser, and when it matured Stothfang neglected payment. To avoid threatened suit Dieckmann satisfied the note of Dibowski by giving his individual note secured by a mortgage on his real estate. At the same time Dieckmann took the note of H. F. Stothfang, which contains a provision, that after the debt which he owed the Atlas National Bank was paid out of certain warehouse receipts for whiskey, which it held in pledge as security for the debt, the balance of said receipts were to be held by said Dieckmann as collateral security to his note, and

in this provision, power of public or private sale was conferred upon him. This instrument was executed and delivered on the 12th day of May, 1899, and on the 15th day of May, a copy of the above note and provision was served on the bank, with a notice that it should keep possession of the warehouse receipts pledged with it as collateral security for its claim against the pledgor (Stothfang), and that after it was fully paid, the balance of the warehouse receipts were to be turned over to Henry Dieckmann, who is one of the defendants in error. This notice and copy of the note given him were received, accepted and acted upon by the bank, and it was holding those receipts when Stothfang assigned on the 7th of August, 1899. It seems no question was raised by the assignee or any creditor as to the right or lien of the Atlas National Bank, but it is insisted that the attempted transfer or pledge to Dieckmann is invalid, because he never was in possession of the receipts, or the whiskey represented by them.

On this branch of the case it may be remarked, that delivery of the property pledged is generally essential to a valid pledge, and it is equally true that to make a valid sale or transfer of any species or article of personal property, a delivery of the property sold or transferred is necessary, and to this extent the authorities cited by counsel for plaintiff in error may be approved. But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas Na-

tional Bank for the money it had loaned to Stothfang. He delivered to the bank, not the one hundred and sixty-five barrels of whiskey, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgor desired to secure the payment of the note held against him by Dieckman, he executed and delivered to him the transfer of all interest in the receipts which would remain, after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe, that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, and even pledge, and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law. In section 297 of Story on Bailments, the author, on the subject of pledges, says: "It is of the essence of the contract, that there should be an actual delivery of the thing to the pledgee. Until

the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver it, and the pledgee acquires no property in the thing. What will amount to a delivery of the thing is, in many cases, a matter of law. *There need not be an actual manual delivery of the thing. It is sufficient if there are any of those acts or circumstances, which, in construction of law, are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of the muniments of title; as by a transfer of the bill of lading, or by a written assignment thereof. So goods in a warehouse may be transferred by a symbolical delivery of the keys thereof * * *.*"

In the case of *Wilson v. Little*, 2 Comst., 443, the court of appeals of New York held: "Possession of the property is essential to the existence of a pledge, but the possession may be according to the nature of the subject. Where the property is not capable of manual delivery and possession (shares of stock in an incorporated company), a pledge may be created by a written transfer thereof * * *."

And on page 447, that court says: "There seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged, provided the interest can be put, by actual delivery or written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by written assignment of the bill of lading. *This is equivalent to actual possession, because it is a delivery of the means of obtaining possession.*"

The case of *Tuxworth v. Moore*, 9 Pick., 347, is also in point. See also *Whitaker v. Sumner*, 20 Pick.,

399. These are but a few of the many decided cases to the same effect. Another view of the facts in this case may be justified. When the bank received the notice appearing in the record, it acted upon it, and in so doing became the agent of Dieckmann for the purposes specified, and its possession might be regarded as the possession of Dieckmann, and thus satisfy the legal requirement as to delivery.

2. Was the pledge or transfer void because of the provisions of section 6343, Revised Statutes, as amended in 1898? As a construction of that section is involved, it is well that it appear in this opinion. It reads:

"Every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them, and act or device done or resorted to by him or them in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made or judgment suffered by a debtor or debtors, or procured by him or them to be made, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors, at the suit of any creditor or creditors, as hereinafter provided, and shall operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured.

"And every *such* sale, conveyance, transfer, mortgage or assignment made, and every such judgment suffered, and every such act or device done or re-

sorted to, by any debtor or debtors, in the event of a deed of assignment being filed within ninety (90) days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent and shall be held to be void as to the assignee of such debtor or debtors, where upon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act or thing, whether he or they had knowledge of such insolvency or not.

“Provided, that nothing in this section contained shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where upon foreclosure or taking possession of such property the mortgagee fully accounts for the proceeds of such property.”

The pledge or transfer to Dieckmann was made on the 12th day of May, 1899, by H. F. Stothfang, and he filed a deed of assignment on the 7th of August of the same year which was within ninety days after the making of the pledge or transfer. Notwithstanding this fact, and the language of section 6343, Revised Statutes, the transactions of the 12th of May are not necessarily void. There still may be valid sales, conveyances and transfers of property made, and which will not be affected although the seller or transferrer may file a deed of assignment within ninety days thereafter. The clause of this section, and which is an important part of the amendment of the original section, provides that, “every *such* sale, conveyance, transfer * * * made by any debtor, or debtors, in the event of a deed of assignment being filed within

ninety days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent, and shall be held to be void as to the assignee of such debtor or debtors, where upon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act or thing, whether he or they (the debtor or debtors) had knowledge of such insolvency or not."

It will be seen that the word "*such*" among the first words of the addition to the original section, fills an important and determinative office in the construction of what follows it. It relates back to the preceding paragraph of the section wherein is provided what sales, transfers * * * shall be declared void as to creditors of such debtor or debtors, at the suit of any creditor or creditors; and the sales and transfers * * * which may be so declared void at the suit of the creditors, are *such* as were made in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion in whole or in part of others; and every sale, conveyance, transfer * * * with intent to hinder, delay or defraud creditors. "*Such*" sales, conveyances, transfers, etc., as are thus enumerated, shall be declared void at the suit of a creditor. And it is "*such*" sales, conveyances, transfers, etc., as above enumerated that shall be conclusively deemed fraudulent and void as to the assignee, if the assignment is made within ninety days after such sale, conveyance, transfer, etc. In order to warrant any other construction, we must eliminate and wholly disregard the word "*such*," which seems to have been purposely used by the legislature and not through accident or mistake. That word brings the class of acts and things done as set out in the original, and which

is yet the principal provision on the subject, down to the new declaration made by the amendment concerning them, and says: "every *such* sale, conveyance, transfer * * * in the event of a deed of assignment being filed within ninety days * * * shall be conclusively deemed and held to be fraudulent," etc.

We have no right or authority to despise or disregard this significant word, but must construe the section with it performing its legitimate function; and if such construction tends to render the amendment of 1898, somewhat unproductive of intended or desired results, it is not the fault of the court, as it is not the law-making power.

Therefore, if the sale or conveyance or transfer was not in contemplation of insolvency; if it was not made with intent to hinder, delay or defraud creditors, or with a design to prefer one or more creditors to the exclusion in whole or in part of others, the transaction will stand in a suit brought by a creditor; and such sale, conveyance or transfer will also stand, although made within ninety days next preceding the filing of a deed of assignment, by the maker of the sale, conveyance or transfer. This conclusion rests upon the ground that the transactions were in good faith, and without the dishonest or fraudulent motive and intent which are the basis of an action to avoid them. The legislature in this part of the law regulating the acts of insolvent debtors and providing a mode of administering their estates, did not intend by the amendment to the section under consideration, to enact a system of bankruptcy, but rather attempted to provide a rule of proof in such cases, as is shown by the entire amendment, because the sales, conveyances and transfers that are "conclusively deemed and held to

be fraudulent," where an assignment follows within ninety days thereafter, are only *such* sales, conveyances and transfers, etc., as are condemned in the main provision of the section, but proof must appear to show that "the debtor or debtors was or were actually insolvent at the time of the act done," whether he or they (the debtor or debtors) had knowledge of such insolvency or not.

It seems clear, therefore, that the transfer or pledge by Stothfang to Dieckmann is not void because it was made within ninety days preceding Stothfang's assignment, but that proof was necessary to show that such transfer was made in contemplation of insolvency; or with a design to prefer one or more creditors to the exclusion in whole or in part of others; or with intent to hinder, delay or defraud creditors, inasmuch as it is *such* sales, conveyances, transfers, *
* * that fall within the ninety day clause.

The record in this case shows none of the foregoing facts *requisite* to avoid the pledge or transfer. It is true Stothfang was insolvent when he made the pledge to Dieckmann, but of this, the latter had no knowledge. There is no finding or fact in the record which brings the case within the section as we construe it, and as no fraud, or intent to prefer, hinder or delay, is shown, we will not presume either.

On both questions we approve of the judgment of the circuit court and it is affirmed.

Affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and
SHAUCK, JJ., concur.

THE BALTIMORE & OHIO SOUTHWESTERN RY. CO. v.
COX, ADMINISTRATRIX.

Action for injury by negligence—Absence of willfulness—Defendant not bound to exercise care toward injured, when—Conductor permitting person to ride on freight train—Does not bind company, when.

1. An action to recover for an injury occasioned by negligence, the element of willfulness being absent, will not lie unless there exists between the defendant and the person injured a relation out of which there arises a duty of the former to exercise care toward the latter.
2. A conductor in charge of a train designed exclusively for the carriage of freight, and operating under rules which forbid the carriage of passengers thereon, cannot, by consenting that a person may ride on such train, impose upon the company the duty of exercising toward him the care which it owes to a passenger.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Ross county.

Mrs. Cox, as administratrix, brought suit in the court of common pleas to recover from the railway company damages for the death of her intestate which was alleged to have been caused by the negligence of the company. In her petition she alleged that on January 4, 1896, her intestate was employed by the company as a locomotive fireman and was riding by its order on one of its freight trains from Mineral City, where he had been employed prior to that time, to Chillicothe; that the train, having reached School-ey's Station, stopped on the siding to permit the passage in the opposite direction of a passenger train, when he left the caboose in which he had been riding and went forward to the engine to talk to the engineer about the employment of the decedent and, at the re-

quest of the engineer, climbed upon the engine; that while he was so upon the engine engaged in conversation with the engineer, the said passenger train approaching at a high rate of speed was, by the negligence of the company, run upon said siding, colliding with said engine and causing the instant death of said John H. Cox. The petition also set out the names of the next of kin of said Cox for whose benefit the recovery was sought.

In its answer the company admitted that the deceased was killed while upon its locomotive which was standing upon a side-track at Schooley's, by a collision with a passenger train which was run upon the siding in consequence of the fact that one of its employes, a brakeman who was acting as a switchman, had failed to disconnect the side-track on which said freight train stood from the main track on which said passenger train was approaching, of which neglect the company had no knowledge. It denied all other allegations of the petition and alleged that decedent was upon said freight train and the locomotive connected therewith without the knowledge or permission of the company and was not there upon any business of or connected with it and was wholly without right to be there.

Upon the trial the plaintiff while introducing a mass of evidence having no relation to any issue in the case also introduced evidence tending to establish the following facts: The accident was due to the negligence of a brakeman who opened the switch to permit an engine to pass from the siding on to the main track, and did not close it. The decedent had been occasionally employed by the company as a fireman for several years, but had not been in its service after the 27th day of the month preceding the acci-

dent. In the meantime he had been visiting friends at Mineral City and on the day of the accident he boarded the freight train, whose conductor was his friend, his purpose being to ride to Chillicothe to look for further employment with the company; and that was the purpose of his interview with the engineer. He had no pass; did not pay fare and did not intend to. The rules of the company were introduced showing that freight trains, unless running as accommodation trains, were not permitted to carry passengers except upon special order. This train was not running as an accommodation train and there was no special order. Another rule forbade engineers to permit any but employes to ride on their locomotives. The train on which the decedent was riding was composed wholly of freight cars with a caboose attached.

At the conclusion of the plaintiff's evidence the trial judge directed a verdict for the company. In the circuit court a judgment which had been rendered in the common pleas upon the verdict so directed was reversed and the cause was remanded to the court of common pleas for a new trial.

Mr. Robert E. Hamill; Mr. Edward Barton and Mr. Willis H. Wiggins, for plaintiff in error.

Under the circumstances, what duty at that time did the railway company owe to John H. Cox at that place on the locomotive engine of a freight train? *Railway Co. v. Bingham*, 29 Ohio St., 369; *Elster v. Springfield*, 49 Ohio St., 82; *Letts v. Kessler*, 54 Ohio St., 73, 85; *Sweeny v. Railroad Co.*, 10 Allen, 368.

Carelton v. Iron & Steel Co., 99 Mass., 216. Here permission is neither inducement, allurement nor enticement.

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In accepting the benefits of a license one assumes all the risks of danger incident thereto except those caused by the willful negligence of affirmative acts of the licensor. The owner of land and buildings assumes no duty to one who is on his premises by permission only as a mere licensee except that he will refrain from willful or affirmative acts. *Gibson v. Leonard*, 143 Ill., 182; 32 N. E. Rep., 182; *Larmore v. Iron Co.*, 101 N. Y., 390.

Willfulness or willful negligence, as it is sometimes called, must be *pleaded* in a petition and *proved* in order for a plaintiff to recover for it. There can be no recovery for willful negligence under a mere averment of negligence. *Shearman & Redfield on Negligence* (5 ed.), Sections 5, 7, 8, 19; *Beach on Contributory Neg.* (2 ed.), Sections 62-64 inclusive, and notes; 14 *Enc. of Pl. & Pr.*, 338 and notes, also p. 345 and note 1; *Railway Co. v. Kingsley*, 177 Ill., 558; 52 N. E. Rep., 931; *Railway Co. v. Eaton*, 53 Ind., 307; *O'Brien v. Loomis*, 43 Mo. App., 29; *Driscoll v. Railway Co.*, 1 Circ. Dec., 274; 1 C. C. R., 493; *Kerwaker v. Railway Co.*, 3 Ohio St., 172; *Darling v. Williams*, 35 Ohio St., 58; *Barholt v. Wright*, 45 Ohio St., 177; *Krause v. Morgan*, 53 Ohio St., 26, 36; *Telegraph Co. v. Griswold*, 37 Ohio St., 301; *Meek v. Pennsylvania Co.*, 38 Ohio St., 632.

The undisputed evidence showed that deceased had no right on the train or engine, but was a mere trespasser, contrary to the rules of the railway company, of which he had full knowledge. He was not an employe nor connected with the service of the railway company at that time. *Railway Co. v. O'Brien*, 2 Circ. Dec., 681; 4 C. C. R., 515; affirmed by Supreme Court, 25 Bull., 88; *Railway Co. v. Morley*, 2 Circ. Dec., 706; 4 C. C. R., 559; *Railway Co. v. Wetmore*, 19 Ohio St.,

110; *Files v. Railway Co.*, 149 Mass., 204; 21 N. E. Rep., 311; *Railroad Co. v. Roach*, 83 Va., 375; 5 S. E. Rep., 175; *Driscoll v. Railway Co.*, 1 Circ. Dec., 274; 1 C. C. R., 493; *Railway Co. v. Norway*, 4 Circ. Dec., 674; 7 C. C. R., 449; *Railway Co. v. Depew*, 40 Ohio St., 121; *Railway Co. v. Graham*, 95 Ind., 286; *Morrissey v. Railway Co.*, 126 Mass., 380.

A railroad company may, as to persons to whom it owes no common law duty of safe transportation, contract against liability to such persons for injuries resulting from its own negligence. *Payne v. Railway Co.*, 62 N. E. Rep., 472; *Russell v. Railway Co.*, 61 N. E. Rep., 678; *Railway Co. v. Voight*, 13 O. F. D., 145; 176 U. S., 498.

Railroad companies as common carriers of passengers are charged with a high degree of care, and may, therefore, in the interest of passengers as well as themselves and the public, make reasonable rules for the protection of passengers, and a party who willfully violates a known rule intended for his safety, and is injured in consequence of such violation can not recover. The rule is the same as to employees. *Railway Co. v. Langdon*, 92 Pa. St., 21; *Downey v. Railway Co.*, 28 W. Va., 732; *Woods v. Jones*, 34 La. An., 1086; *Railway Co. v. Lindley*, 42 Kan., 714; *Warden v. Railway Co.*, 94 Ala., 277; *Aufdenberg v. Railway Co.*, 132 Mo., 565; *Railway Co. v. Clemmons*, 55 Tex., 88; *Posey v. Railway Co.*, 102 Fed. Rep., 236 (42 C. C. A., 293); *Lemasters v. Railway Co.*, 131 Cal., 105; *Railway Co. v. Boyd*, 6 Tex. Civ. App., 205.

Freight trains are not usually intended for the carriage of passengers, and one who gets upon such a train to be carried, without paying fare, is *prima facie* not a passenger, although he rides with the consent of the conductor, and if he is injured by reason of the

Railway Co. v. Cox, Admx.

negligence of the railroad company, it is not liable. *Railway Co. v. Black*, 87 Tex., 160; *Railway Co. v. White*, 34 S. W. Rep., 1042 (not officially reported); *Railway Co. v. Hanna*, 58 S. W. Rep., 548; *McVeety v. Railway Co.*, 45 Minn., 268; *Alward v. Oakes* (1895), 63 Minn., 190; *Railway Co. v. Hailey*, 94 Tenn., 383; *Railroad Co. v. Bogle*, 101 Tenn., 40; *Flower v. Railway Co.*, 69 Pa. St., 210; *Eaton v. Railway Co.*, 57 N. Y., 382; *Powers v. Railway Co.*, 153 Mass., 188; *Files v. Railway Co.*, 149 Mass., 204; *Powell v. Railway Co.*, 8 So. Rep., 738 (not officially reported); *Smith v. Railway Co.*, 124 Ind., 394; *Railway Co. v. Barnes*, 137 Ind., 306; *Menaugh v. Railway Co.*, 157 Ind., —; s. c., 60 N. E. Rep., 694; *Railway Co. v. Griffith*, 63 Ark., 491; *McCauley v. Railway Co.*, 93 Ala., 356; *Cooper v. Railway Co.*, 136 Ind., 366; *Springer v. Byram*, 137 Ind., 15; *Stalcup v. Railway Co.*, 16 Ind. App., 584; *Railway Co. v. Roach*, 83 Va., 375; *Morris v. Brown*, 111 N. Y., 318; *Railway Co. v. Best*, 169 Ill., 301; *Purple v. Railway Co.*, 114 Fed. Rep., 123.

Even if the deceased may have had the right to ride in the caboose, he was not there when he was hurt; he had no business on the engine. *Eaton v. Railway Co.*, 57 N. Y., 382; *Coyle v. Railway Co.*, 155 Ind., 429.

If deceased was an employe the fellow-servant rule applies. If not an employe there is a fatal variance.

Recent decisions have made it clear that a railroad company may relieve itself from liability for negligence as to parties riding upon its trains, but whom it is not obliged to carry. One who is riding upon a free pass given him as a mere gratuity, and which contains a provision exempting the company from negligence, can not recover, even although he establishes negligence. *Payne v. Railway Co.*, 62 N. E. Rep., 472.

So, since a railway company is under no legal duty to carry employes of sleeping-car companies, it is held that a contract specifically releasing it from all liability for negligence towards such an employe riding in a sleeping-car attached to one of the railway company's trains, is valid. *Russell v. Railway Co.*, 61 N. E. Rep., 678.

So, a railroad company may by contract relieve itself from liability for injuries to an express messenger upon its train which result from its negligence, the reason being that it is under no obligation to carry express messengers. *Powers v. Railway Co.*, 153 Mass., 188; *Wilton v. Railroad Co.*, 107 Mass., 108; *Healey v. Railway Co.*, 28 Ohio St., 23.

It may be questioned whether the conductor had any more right to invest him with the rights of a licensee than with those of a passenger. At all events, if the plaintiff was on the defendant's train simply by the license of the conductor, he was there under such circumstances that the defendant was not responsible to him for any injury which occurred to him in consequence of the collision. *Flower v. Railroad Co.*, 69 Pa. St., 210; *Morris v. Brown*, 111 N. Y., 318; *Powell v. Railway Co.*, 8 So. Rep., 738; *Alward v. Oakes*, 63 Minn., 190; *Railroad Co. v. Bogle*, 101 Tenn., 407; *Posey v. Railway Co.*, 102 Fed. Rep., 236; *Lemasters v. Railway Co.*, 131 Cal., 105.

It is said in the brief of counsel that Cox was not "riding" on the engine, but only sitting there. That we submit is nothing but a quibble to which there is a corresponding. *Railway Co. v. Jones*, 95 U. S., 439; *Railway Co. v. Lane*, 83 Ill., 48; *Hickey v. Railway Co.*, 14 Allen, 429; *Railway Co. v. Lindley*, 42 Kan., 714.

This is not a case of an employe. Cox had not been in the employ of the company since December 27th. He was not directed to go to Chillicothe. It was not in the line of his duty to do so, and if it had been, he had no business on a freight train. *Wolsey v. Railroad Co.*, 33 Ohio St., 227; *Railway Co. v. Litz*, 7 Circ. Dec., 282; 18 C. C. R., 653; *Railway Co. v. Ward*, 61 Fed. Rep., 927; *Railway Co. v. Barry*, 84 Fed. Rep., 944; *Railway Co. v. Boyd*, 6 Tex. Civ. App., 205.

But apart from the statute, the engineer of one train and the conductor of another are fellow-servants. *Railway Co. v. Devinney*, 17 Ohio St., 197.

This being the rule it was incumbent upon the plaintiff to bring her case within one of the exceptions made by the statute (Act of April 2, 1890; 87 Ohio Laws, 149). This she wholly failed to do, because (a) Hendershot, the conductor at fault, would not have been Cox's conductor. Had he gotten Fitzsimmons' run he would have had Fitzsimmons' conductor, who was Dixon. (b) The burden rested upon plaintiff to show that deceased would have been one of those who, in the words of the statute, "have no power to direct or control in the branch or department in which they are employed." (87 Ohio Laws, 150, Sec. 3.) There was no evidence to that effect. (c) In the absence of evidence upon the subject, the presumption is that an engineer has power to direct and control his fireman. *Railroad Co. v. Margrat*, 51 Ohio St., 130; *Railway Co. v. Baugh*, 7 O. F. D., 606; 149 U. S., 368.

Mr. John C. Entrekin and *Mr. John T. Phillips*, for defendant in error.

The railroad company admitted in open court that Hendershot, the conductor of the wild train, had no

business to leave the switch open; this was an admission of negligence on the part of the company because Hendershot was an employe of the company; he had charge of the train, and the evidence showed that he had charge of both the engineer and fireman on that train; therefore, even if the question of fellow servants was in the case, which it is not, his negligence would have bound the company because he was a superior to Cox, who was only fireman when employed by the company. The question, however, of fellow servant does not arise, for the reason that Cox at the time was not in the actual employ of the company and therefore had all the rights of third persons against the company to be protected from the active negligence of the company or its agents and employes. He was entitled to be thus protected, whether he was a trespasser, or whether he was a passenger upon that train, or whether he was a mere licensee. He was on this train by the consent of the conductor in charge of it from Zaleski to the place where the accident occurred. The fact that he was a gratuitous passenger makes no difference. He then went at the suggestion of the conductor forward to see the engineer, while the train was not in motion, and went up into the engine for the purpose of talking to the engineer about a matter of business in which he, Cox, was interested and in which the engineer was interested, and in which the company was interested. He was not riding on the engine in violation of any rule of the company; the company had undertaken through its agent, the conductor, to carry him on this train, and he had no right to injure him actively by its negligence, and even though he had no right to ride on the train from Zaleski to Schooley's, where the train stopped, and even

though he was a trespasser in so doing, yet when he left the caboose and went forward, and with the consent of the engineer, got upon the engine and talked to the engineer, who had a right there under the rules of the company upon a business matter in which both of them were interested; he ceased to be a trespasser and the company would have been liable not only for the act of negligence of one of its agents in opening the switch and in going away without closing it such as this was, but would have been liable beyond that for even its careless omission to keep its tracks in repair or any other mere omission by its negligence.

Upon the question that Cox was not a trespasser in going upon the engine to talk upon this business see *Railway Co. v. O'Brien*, 2 Circ. Dec., 681; 4 C. C. R., 515.

Upon the question of his having a right on the train by the consent of the conductor and engineer. 19 Am. & Eng. Ency. Law (1 ed.), 934; *Rosenbaum v. Railway Co.*, 38 Minn., 173; *Gradin v. Railway Co.*, 30 Minn., 217.

Upon the question of his having a right to go and talk to the engineer on business. *Railway Co. v. Bingham*, 29 Ohio St., 373.

Upon the question of whether if Cox had a right by the consent of the conductor to ride upon the train he lost it by going from the caboose to the engine. *Healey v. Railroad Co.*, 28 Ohio St., 23; *Wilton v. Railroad Co.*, 107 Mass., 108; *Vail v. Railway Co.*, 7 Circ. Dec., 28; 13 C. C. R., 494; *Schwartz v. Street Ry. Co.*, 4 Circ. Dec., 272; 8 C. C. R., 484.

Upon the question of whether the act of Hender-shot binds the company. *Ramsdale v. Railway Co.*, 104 Mass., 117.

But even if Cox was a trespasser pure and simple in going upon the engine, this does not relieve the company from liability from its active negligence in killing him. It was in the possession and control of powerful and dangerous agencies and it was required to so use them so as not to injure Cox, even if he was trespasser. *Wood Master & Servant*, p. 777; *Kerwhaker v. Railway Co.*, 3 Ohio St., 172, 195; *Railway Co. v. Stallmann*, 22 Ohio St., 1; *Railway Co. v. Kassen*, 49 Ohio St., 230; *Railway Co. v. Kelly*, 5 Circ. Dec., 662; *Railway Co. v. Schade*, 8 Circ. Dec., 316; 15 C. C. R., 424; *Larmore v. Iron Co.*, 101 N. Y., 390.

There is no question of contributory negligence in the case. It might be said that if Cox had been in the caboose and not on the engine he would not have been killed, but his being upon the engine was not the proximate cause of his death and his being there did not contribute to his death in the legal sense. It was the negligence of the company that proximately caused his death and this was what caused the collision. The collision would have occurred whether Cox was on the engine or not, so that his being on the engine did not in any way contribute toward causing the collision which resulted in his death, and whether he had any business on the engine or not, makes no difference so far as this question is concerned, so there is no question of contributory negligence on his part.

The plaintiff below claimed that it was a case of gross negligence, amounting in effect to recklessness, and that in such case it made no difference whether the decedent was a trespasser or not and that this was a question for the jury on the evidence.

So that the case could not rightfully be withdrawn from the jury whether the decedent was a trespasser

or mere licensee, and the circuit court had a right to reverse the judgment below.

Upon the question of whether a recovery can be had upon the pleadings as they are. 14 Am. and Eng. Ency. Pl. & Pr., 338; *Nolton v. Railway Co.*, 15 N. Y., 444.

The common pleas court failed to recognize the difference between acts of negligence of commission and those of mere omission. It also failed to recognize the fact that Cox had business on the engine even though he might have been a trespasser while he was riding in the caboose, and the engineer having a right on the engine and it being contrary to the rules of the company for him to leave the engine, this gave a right to any one having business with him to go upon the engine without being a trespasser; and even if the collision had been caused by an act of omission on the part of the company, Cox would have been protected under the doctrine laid down in *Railway Co. v. Bingham*, 29 Ohio St., 364.

The facts in the case show that there was no mere negligence on the part of the company, that it was a case of gross negligence in leaving the switch open with a train running forty-five miles an hour within six or eight minutes at the very furthest away, and with no reasonable hope that any one would discover the switch open in time to prevent a collision. 5 Am. Neg. Rep., 139; *Railway Co. v. Kelly*, 5 Circ. Dec., 662; 12 C. C. R., 341; *Such v. Railway Co.*, 2 Re., 352; 2 W. L. M., 486; *Railway Co. v. Margrat*, 51 Ohio St., 130; *Railroad Co. v. Karsten*, 49 Ohio St., 230; *Railroad Co. v. Schade*, 57 Ohio St., 650; *Railroad Co. v. Allen*, 64 Ohio St., 183.

SHAUCK, J. It is elementary that actionable negligence exists only when one negligently injures

another to whom he owes the duty, created by contract or operation of law, of exercising care. *Burdick v. Cheadle*, 26 Ohio St., 393; *Railway Company v. Bingham*, 29 Ohio St., 364; *Elster v. Springfield*, 49 Ohio St., 82. There being in the present case neither allegation nor evidence that the fatal injuries were inflicted willfully or intentionally, there can be no recovery unless there existed between the decedent and the company a relation which imposed upon it the duty of exercising care toward him. Although it was alleged in the petition that he was at the time of the accident in the service of the company and traveling on a freight train in obedience to its orders, the allegation was denied in the answer and refuted by the testimony of the plaintiff herself.

The view of counsel for the defendant in error appears to be that the duty of the company to exercise care toward the decedent arose out of the fact that he was riding on the freight train with the express or implied assent of the conductor; and this view is said to have been taken in the circuit court. It invokes the doctrine of the law of agency; and, since the company did not authorize the transportation of passengers on its freight trains, it relies upon the implied or apparent authority of the conductor to bind the company to a relation which its rules forbade. It assumes that the company had given to the conductor an apparent authority which its operating rules had expressly denied him. But the apparent authority of the conductor was to represent the company in the conduct of that portion of its business to which the train in his charge was appropriate. It did not, therefore, exceed his actual authority. The differences between trains intended exclusively for the carriage of freight and those intended for the carriage

of passengers are so obvious and familiar as to forbid the view suggested. The cases in which a recovery has been denied upon such facts as are here presented are so numerous that it is not practicable to cite them fully. Among them are *Eaton v. Railroad Co.*, 57 N. Y., 382; *McVeety v. Railroad Co.*, 45 Minn., 268; *Railroad Co. v. Roach*, 83 Va., 375; *Files v. Railroad Co.*, 21 N. E. Rep., 311; *Smith v. Railroad Co.*, 124 Ind., 394; *Railroad Co. v. White*, 34 S. W. Rep., 1042; *Railroad Co. v. Hailey*, 94 Tenn., 383; *Railway Co. v. Black*, 87 Tex., 160.

The adjectives used to characterize the negligence of the brakeman in leaving the switch open should not be permitted to excuse the obvious failure of the plaintiff below to place her intestate in the position of one to whom the company owed care. In directing a verdict for the defendant the trial judge correctly applied to the evidence the pertinent principles of the law as they are illustrated in the decided cases.

Judgment of the circuit court reversed and that of the common pleas affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

SOUTHWARD v. JAMISON ET AL.

Summons issued on petition—Sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition—Mortgage foreclosure—Allegations necessary by mortgagor—To bind party assuming and agreeing to pay mortgage debt—Pleadings.

1. So long as a cross-petition in an action is strictly confined to "matters in question in the petition," the summons issued on the petition would be sufficient notice to sustain a judgment rendered on the cross-petition; but when the cross-petition sets up matters which are not drawn "in question in the petition," and seeks affirmative relief against a codefendant, of a nature different from that sought in the petition, a summons to the party to be charged, issued on the petition, will not confer jurisdiction to render judgment on the cross-petition, especially when the cross-petition is filed after the defendant thereto is in default for answer to the petition, and a summons on the cross-petition in such case is necessary. *Brown v. Kuhn et al.*, 40 Ohio St., 468, explained and qualified.
2. In an action for foreclosure of a mortgage, in which there are neither the proper averments nor a prayer, upon which to found a personal judgment, it is error to adjudge or decree that a defendant shall pay the whole amount of the debt secured by the mortgage, and to award execution therefor.
3. In an action to foreclose a mortgage, after the proceeds of the sale of the mortgaged premises have been exhausted, the court cannot award execution or render judgment for any balance due, against a person who has assumed and agreed with the mortgagor to pay the mortgage debt, unless the plaintiff elects to avail himself of the agreement to assume and pay, and alleges the same against the person assuming the mortgage debt, and the latter has been summoned to answer such claim.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Pickaway county.

The defendant in error, Robert B. Jamison, commenced this action by a petition in the court of com-

mon pleas of Pickaway county against the plaintiff in error, John Southward, seeking to subject certain real estate to the payment of a judgment lien. There was a partition suit pending at the time of the levy of the judgment, wherein Annie Dawson was plaintiff and John Southward et al. were defendants. This last named case was consolidated with this action, and such proceedings were had that the court of common pleas found for the defendants. An appeal was taken to the circuit court and on the final hearing in that court findings were made as follows:

"First—That on November 30, A. D. 1889, the Union Central Life Insurance Company filed its petition and thereby commenced a civil action in the court of common pleas of Delaware county, Ohio, against Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz, J. H. Martz, Mary A. Huddle and John Southward; that said action was brought to foreclose a mortgage executed by said Mary L. H. Jamison and R. B. Jamison, her husband; S. Jennie H. Martz and J. H. Martz, her husband; and Mary A. Huddle to the said Union Central Life Insurance Company upon lands in said Delaware county, Ohio; that said mortgage secured a note signed by said Mary L. H. Jamison and S. Jennie H. Martz and endorsed by R. B. Jamison and J. H. Martz; that said John Southward was made a party defendant in said action and the only allegation contained in said petition, referring to the said John Southward, is as follows:

"Plaintiff further says and it charges that said defendant, John Southward, since the filing of said mortgage herein described, has purchased and is now the owner of said real estate subject to plaintiff's said mortgage, and asks that he may be notified of the filing, pendency and prayer of this petition and that

he may be required to answer the same as to his interest in said real estate.

"That said petition contained the following prayer:

"Plaintiff therefore prays judgment against the said defendants, Mary L. H. Jamison and S. Jennie H. Martz, as principals, and said R. B. Jamison and J. H. Martz, as endorsers on said notes for said sum of \$7,700 with seven per cent. interest thereon since October 1, 1889, and for the said sum of \$140.22, together with eight per cent. interest thereon since first day of October, 1889, and that upon failure to pay the same within a short day to be named by the court, the said mortgage may be foreclosed and the real estate be advertised and sold, and the proceeds of said sale be applied in the payment of plaintiff's claim and for all proper relief.

"That said John Southward was then a resident of Madison county, Ohio, and was duly served with a summons issued in said action, dated November 30, 1889, by the sheriff of said Madison county, Ohio, at his residence in said Madison county; that the said summons was served upon him December 3, 1889, and required him to answer said petition on or before December 28, 1889, and that no answer or other pleading was ever filed by him in said case.

"Second—That on January 25, 1890, the said defendants, Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz, filed their answer in said case, waiving the issuing and service of process in said case, and admitting the execution of said note and mortgage, and as a cross-petition therein, they say:

"That on or about the nineteenth day of April, 1889, they bargained and sold to one John Southward, of Madison county, state of Ohio, the said real estate

in the plaintiff's petition described, and for a valuable consideration, executed and delivered to the purchaser, the said defendant, John Southward, a warranty deed for the same, save and except the sum of \$4,451.25, and the interest thereon, which sum with said interest, the said John Southward then and there promised and agreed to promptly pay to said plaintiff, the said Union Central Life Insurance Company, as the same became due and the said sum of \$140.22, in plaintiff's petition charged is the interest which said defendant, John Southward, agreed to pay on said first day of October, 1889, but which he has utterly failed and neglected to do. Defendants say that John Southward accepted said deed from these respondents knowing full well that it contained a warranty against all claims except the said sum of \$4,451.25, and the interest thereon, and all taxes falling due after June 20, 1889, of which clause the following is a true copy: "Except as to mortgage indebtedness to the Union Central Life Insurance Company, of Cincinnati, Ohio, amounting to the sum of \$4,451.25, with interest from this date and taxes falling due after June 20, 1899, which grantee assumes and by acceptance hereof agrees to pay.

"That he, the said John Southward, took possession of said lands and received the wheat crop harvested on said lands in July, 1889, which crop these defendants would have received were it not for said sale of the premises. These defendants further say they have no longer control of said lands or the income and profits derived from the same, and the said defendant, John Southward, utterly failing to pay said interest now past due, they ask that the said premises may be ordered sold on the foreclosure of said mortgage and the proceeds of said sale be applied on the

said note in plaintiff's petition described, and for all further relief.

"Third—That said defendant, Mary A. Huddle, waived and entered her appearance in said case; that on February 4, 1890, an entry was made in said court in said case as follows:

"This day came the plaintiff by its attorneys and this cause was heard upon the petition, the answer of Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz, the proofs and exhibits, and the court finds that each and all of the defendants except John Southward have waived the issue and service of process and have entered their appearance herein, and that they have confessed the allegations of the petition to be true; that the defendant, John Southward, hath been duly served with process herein, and that he is in default for answer or demurrer to the petition of the plaintiff, and hath thereby confessed the same to be true, and that there is due the plaintiff on the promissory notes in petition set forth and described, the sum of \$8,028 with interest from this date on \$7,700 at 7 per cent. per annum, and on \$140.22, at eight per cent. per annum, and \$187.98, thereof, at six per cent. per annum, and that to secure the payment of said notes, the defendants, Mary L. H. Jamison and R. B. Jamison, her husband, S. Jennie H. Martz and J. H. Martz, her husband, and Mary A. Huddle, executed and delivered to the plaintiff their certain mortgage as in the petition described, and on the premises therein described; that the same was duly filed and recorded as in the petition set forth and that the conditions in said mortgage have been broken.

"That said premises were then ordered to be sold and the proceeds thereof to be brought into court for dis-

tribution, and as to the first cause of action in the petition set forth and as to all other matters and issues this cause is continued.

"That a sale of said premises was made by the sheriff of Delaware county, Ohio, and on May 10, 1890, the said sale was duly confirmed by said court, and at the same time the said court made the following entry: On motion of the plaintiff—and this cause coming on to be heard on the first cause of action in the petition set forth and the cross-petition herein filed of Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz, and upon the proofs and exhibits, and the court finds that said defendant, John Southward, is in default for answer or demurrer thereto, and that the allegations of said cross-petition are thereby confessed by him to be true, and that said defendants, Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz, conveyed the premises described in the petition to said John Southward in the manner and at the time as set forth in said cross-petition, and that the said John Southward at the time of said conveyance and as part of the consideration therefor agreed with said codefendants to pay to plaintiff the sum of \$140.22, being a portion of the coupon note hereon sued on, on the first day of October, 1899, and the further sum of \$4,451.25, with interest thereon from the eighteenth day of April, 1889, being part of the sum due on the principal note herein sued on, and also the taxes on the premises falling due after June 20, 1889.

"The court finds that said John Southward has not complied with the terms of said agreement; that he has not paid either of the above mentioned sums either in part or in whole; that the taxes for June, 1890, are not paid, and that there is due said plaintiff from

said John Southward in pursuance of said agreement, the sum of \$4,787.83, with interest at the rate of seven per cent. per annum from date.

"Wherefore it is ordered and decreed by the court that the said John Southward pay said sum of \$4,787.83 to the plaintiff and save harmless therefrom said codefendants, Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz.

"And the court coming now to distribute the proceeds of said sale amounting to \$4,050 it is ordered that the sheriff aforesaid, out of the money in his hands pay:

"First—To the treasurer of said county the taxes against said premises, to-wit, the sum of \$49.14.

"Second—The costs of this action, taxed at \$91.63.

"Third—To the plaintiff, The Union Central Life Insurance Company, the residue of the money remaining in his hands, to-wit, the sum of \$3,909.23, which said sum shall be applied in liquidation of plaintiff's claim as a payment thereon.

"And there still remaining due plaintiff from said defendant, John Southward, the sum of \$878.60, for which execution is awarded against him, and there also remaining due plaintiff from defendants, Mary L. H. Jamison, R. B. Jamison, S. Jennie H. Martz and J. H. Martz, the sum of \$3,390.09, for which execution is awarded against them, and there further remaining due plaintiff from said last named defendants, jointly, with said John Southward, the above mentioned sum of \$878.60, for which execution is awarded against them after the said John Southward has been fully exhausted by legal process as above ordered in the collection of said last named sum.

"Fourth—That said John Southward had no other or further notice served on him of the filing of the

petition or the answer and cross-petition in said action than the service of said original summons in said action as aforesaid, which was served on him December 3, 1889.

“Fifth—That the foregoing averments are all the averments contained in the record of said cause affecting the said John Southward.

“Sixth—That said judgment was duly assigned by said Union Central Life Insurance Company to the said plaintiff herein, Robert B. Jamison.

“Seventh—That on October 6, 1889, an execution was issued out of the said court of common pleas of Delaware county, Ohio, in said case, against said John Southward upon said judgment for said sum of \$878.60, and interest thereon from May 10, 1890, at seven per cent. directed to the sheriff of Pickaway county, Ohio, and that said sheriff levied the same upon the undivided one-fourth part of the lands in the plaintiff's amended petition described, lying in Pickaway county, Ohio, as the property of said John Southward, and that said land was advertised by the said sheriff for sale and before day of sale, said sale was withdrawn on account of litigation pending in this case.

“That at the time said levy was made there was a suit pending in the court of common pleas of Pickaway county, Ohio, now consolidated with this case, wherein one Anna Dawson was plaintiff and John Southward and others were defendants (numbered 9978 on the docket of said court), to partition the real estate of which Pleasant Southward, the father of said John Southward, died seized; that said Pleasant Southward died May 22, 1892; that said levy was made while said partition suit was pending and before any order of partition was made in said case;

that on October 15, 1892, said John Southward and his wife, by quitclaim deed, conveyed all their interest in the lands described in said partition suit to G. W. Southward, and said deed was filed for record with the recorder of Pickaway county, Ohio, on December 19, 1894; that on October 24, 1892, an order of partition was made in said case and same was continued as to all other questions.

"That on December 10, 1892, the plaintiff herein, R. B. Jamison, was made a party defendant in said partition case and filed an answer and cross-petition therein admitting that the said John Southward was the owner of said undivided one-fourth interest in said lands and setting up that he had obtained the said judgment in the Delaware common pleas; that he had levied upon said John Southward's undivided interest in said land, and that the same was a valid and subsisting lien thereon, and asking that the same be declared a lien upon it, and that when said premises were sold under the order and proceedings in partition, that the interest of the said John Southward therein might be ordered paid to him to the amount of said judgment, interest and costs, or if there was not enough realized on the sale of said premises out of the interest of the said John Southward to pay said judgment in full, that such unpaid amount be declared a lien upon the portion of said premises set off to said John Southward, and that he have such other and further relief as is equitable.

"That on said tenth day of December, 1892, the said Granville W. Southward, who was a son of the said John Southward, on his own motion, was made a party defendant to said partition case, and asked leave to file an answer and cross-petition therein instanter, which leave was granted by the court, and the said

answer and cross-petition was filed as of that date, setting up his claim to said land.

"That on December 17, 1892, the said R. B. Jamison filed a reply to the answer and cross-petition of the said Granville W. Southward, taking issue with the facts therein set forth: That afterwards, on said December 17, 1892, said Granville W. Southward withdrew his answer and cross-petition from the files of said court, and an order of partition was granted in the usual form, decreeing among other things that the said John Southward was the owner of an undivided one-fourth interest therein.

"That on November 26, 1892, the commissioners appointed to make such partition, made their report as follows: 'Upon actual view of the premises, we are of the opinion that the said lands cannot be divided without manifest injury; and we do estimate the value of the same at: First tract, (A.) 30.65 A., appraised at \$12.50 per acre. First tract, (B.) 53.4 A., appraised at \$46.54 per acre. Second tract, 56.7 acres, appraised at \$42.46 per acre. Third tract, A. and B., 44 poles of land and building, \$600. Fourth tract, 36 poles of land and building, \$1,033. Fifth tract, 36 poles of land and building, \$850.'

"That on December 17, 1892, an order was made in said case in said court as follows: 'This cause coming on this day for hearing upon the return of the sheriff and the report of the commissioners heretofore appointed herein, and on motion to confirm the same, and it appearing from said report that said estate could not be divided by metes and bounds without injury to the value thereof, and that said commissioners have made and returned their appraisement, the court find the said return and proceedings in all respects

correct and in conformity to law and do therefore approve and confirm the same.'

"And it being made further to appear to the court that dower has heretofore been assigned to Abigail Southward, widow of said Pleasant Southward, deceased, in land not included in these proceedings, no dower in these premises was assigned her.

"And it being made to appear to the court that the said parties, both plaintiff and all of the defendants, by agreement have elected to take the said premises at the appraisement, excepting tract No. 1 of said surveyor's report, which said tract by consent of all the heirs is hereby reduced to \$43.50 from the appraisement of \$46.54, and the said parties, both plaintiff and defendants, elect to take as follows:

"Tract No. 1, taken by John Southward at \$42.50 as per agreement. Tract No. 2, taken by Annie Dawson at the appraisement. Tract No. 3, taken by Margaret Clarridge at the appraisement. Tract No. 4, taken by Jane Lister at the appraisement. Tract No. 5, taken by Jane Lister at the appraisement. Tract No. 6, taken by Henrietta Hays at the appraisement.

"And the court further finding that the total property so taken by the parties respectively, amount to the sum of \$8,462.60.

"That the costs, including the sum of \$184.28 to Schleyer & Abernethy and to Samuel W. Courtright, the sum of \$25, as a counsel fee amounting to the sum of \$307.59.

"That the said John Southward, Margaret Clarridge and Jane Lister are each entitled to one-fourth part of said total sum after deducting the taxes and costs, to-wit, the sum of \$2,038.74.

"That the said Annie Dawson and Henrietta Hays are each entitled to the one-eighth part of said total

sum deducting the taxes and costs, to-wit, the sum of \$1,019.37.

"It appearing to the court that the property so elected to be taken by said John Southward, Margaret Clarridge and Annie Dawson after the application of their distributive share of said estate to the payment of the same leaves a balance to be paid by them respectively as follows: By John Southward, the sum of \$230.76; by Margaret Clarridge, the sum of \$368.74; by Annie Dawson, the sum of \$283.25.

"And it is further ordered that the parties respectively pay to the sheriff of Pickaway county, Ohio, the said sum in excess of their respective shares of said estate.

"The court further find that after the application of the amount of property so elected to be taken by the said Jane Lister and Henrietta Hays to their respective shares of said estate, there remain due them respectively the sum of: To Jane Lister, the sum of \$405.74; to Henrietta Hays, the sum of \$169.37.

"It is therefore ordered that the said estate so divided and appraised and so taken by said heirs respectively, be and hereby is adjudged and decreed to said heirs upon their complying with the foregoing order; the said sheriff is thereupon directed to make, execute and deliver to each of said heirs respectively, a good and sufficient deed for said premises so elected to be taken by each.

"And the court coming now to distribute the funds in the hands of said sheriff does hereby order and direct that he pay, first, the costs in this case, amounting to \$307.59; second, to Jane Lister, the sum of \$405.74; third, to Henrietta Hays, the sum of \$169.37.

"Eighth—That on December 17, 1892, the sheriff of Pickaway county, Ohio, as directed by said order, executed and delivered to John Southward a deed for the 53 2-5 acre tract of land which is the same land described in the plaintiff's supplemental answer and cross-petition filed herein, which deed was filed for record with the recorder of Pickaway county, Ohio, December 19, 1894; that on December 17, 1894, the said G. W. Southward and wife executed and delivered to Jackson Baker, a deed of general warranty for the same premises, and which deed was filed for record with the recorder of Pickaway county, Ohio, on December 19, 1894; that on October 10, 1898, John Southward and wife executed and delivered to Jackson Baker, a quitclaim deed for the same premises, and which deed was filed for record with the recorder of Pickaway county, Ohio, on October 12, 1898.

"From the foregoing facts, the court finds that the said judgment rendered in the court of common pleas of Delaware county, Ohio, in favor of the Union Central Life Insurance Company and against the said John Southward, is not void, but that the same is a valid judgment against said John Southward, and that the levy so made under the execution issued upon said judgment, constitutes a valid lien upon said real estate in said supplemental answer and cross-petition described, and that said plaintiff is entitled to have the same sold in order to pay the amount due him upon his said judgment.

"To each and all of the foregoing conclusions of law the defendant, John Southward, as well as the defendants, Elizabeth Baker, Orin Baker, Edgar J. Baker, John W. Baker, Lawson Baker, Alton McCafferty, Roy McCafferty, Everett McCafferty and Lawrence McCafferty excepts."

The petition in error in this case is to reverse the judgment of the circuit court rendered upon these findings.

Mr. Milt Morris, for plaintiff in error.

There is a well settled rule of law that every party to a litigation or action, in any degree affecting his rights, is entitled to his day in court, and to afford this day in court, the law provides the manner of giving notice of the pendency and purpose of the action which must be strictly followed unless the party enters his appearance and waives the service of this notice, and there was no appearance entered in this case by said John Southward.

The plaintiff had no right to its judgment against said John Southward upon its petition, because it did not ask for any, nor did it allege facts sufficient to entitle it to any judgment against said John Southward, nor was it entitled to any judgment against Southward upon the averments in the answer and cross-petition filed by said Jamison and others, for the reason that said Southward had no notice of the filing of said answer and cross-petition as we have hereinbefore stated.

The Union Central Life Insurance Company had no right to this judgment, and we contend that the same is absolutely void and of no force or effect, and may be so treated wherever it is met. *Wood v. Stanberry*, 21 Ohio St., 142.

1. "The jurisdiction of a court or tribunal entering a judgment in any particular case may always be inquired into, when a judgment is made the foundation of an action, in the court of a state in which it was rendered, or of any other state."

2. "A personal judgment rendered against one over whom the court has no jurisdiction, is wholly void." *Spier v. Corll*, 33 Ohio St., 236.

We maintain that the record in this case shows that the court of common pleas of Delaware county, Ohio, had no jurisdiction to render a judgment against said John Southward, and that the pretended judgment so rendered by it, is void and of no effect. *Kingsborough v. Tousley*, 56 Ohio St., 450; *Greene v. Railway Co.*, 62 Ohio St., 67; *Poe v. Dixon*, 60 Ohio St., 124.

We are aware of the fact that in an action to foreclose a mortgage, the court may award execution for the balance remaining due after exhausting the proceeds of the mortgaged property, although no personal judgment is or prayed for. *Giddings v. Barney*, 31 Ohio St., 80; *Maholm v. Marshall*, 29 Ohio St., 611.

A personal judgment cannot be rendered upon a cross-petition without a summons issuing thereon when the defendant is in default for answer to the original petition. *Thatcher v. Dickinson*, 2 Circ. Dec., 82; 3 C. C. R., 144; *Bailey v. Young*, 11 Circ. Dec., 257; 20 C. C. R., 546.

Messrs. Abernethy & Folsom, for defendants in error.

Only one of the many questions which were before the court below is relied upon in this court, viz.: was the finding against John Southward in the Delaware common pleas void, because no summons was issued, and served upon him giving notice of the filing of the cross-petition.

The question may well be asked at this point, what were the rights of the different parties in the land and

the mortgage debt at the time of the bringing of the suit in the Delaware common pleas?

We believe it will not be disputed that they were in a general way as follows:

1. The plaintiff, mortgagees, had an interest in the mortgage and the premises securing the same.

2. The defendant, John Southward, being the owner of the land, of course, had an interest in it.

3. He having assumed and agreed to pay a part of the mortgage indebtedness became the principal debtor, and the mortgagors became his sureties.

4. As such sureties (the cross-petitioners) had a right to ask that they be indemnified against the debt so assumed, and they were also interested in the land, they having a right to have it applied on the debt.

John Southward was a necessary party to the suit brought by the insurance company to foreclose its mortgage, he being the owner of the land. His co-defendants, the mortgagors, were also necessary and proper parties, they being his sureties on the mortgage debt. Section 5006, Rev. Stat.; Pomeroy on Remedies, Sec. 271; 2 Jones on Mortgages, Sec. 1394; (1) as owner of the land, and (2) as principal in said debt; 2 Jones on Mortgages, Sec. 1406; *Bishop v. Douglass*, 25 Wis., 696; *Green v. Dixon*, 9 Wis., 532.

Under the assumption of, and agreement to pay a part of said mortgage indebtedness, John Southward became the principal debtor; in other words, he *stepped into the shoes of the mortgagors*, and they became the sureties. *Poe v. Dixon*, 60 Ohio St., 124. As sureties they had a right to be indemnified against \$4,471.25 of the mortgage debt assumed and agreed to be paid by Southward and to insist that the land held by the mortgagees should first be sold and applied thereon.

The mortgagors had a right, by cross-petition to set up their sale of the premises to John Southward, his assumption of, and agreement to pay a portion of said mortgage indebtedness; and their prayer that the premises be ordered sold, the proceeds of said sale applied on the mortgage note described in the petition, and for all further relief, was the proper prayer upon which to base the decree.

A surety may, by action, compel a principal to pay a debt after it is due. Sec. 5845, Rev. Stat. A surety may ask a court of chancery to aid in subjecting the estate of the principal to the payment of the debt without first advancing or paying the money. *Stump v. Rogers*, 1 Ohio, 533; *Hale v. Wetmore*, 4 Ohio St., 600; Section 5068, Revised Statutes.

Under this section it was held in *Kimmel v. Pratt*, 40 Ohio St., 344, that a plaintiff against whom an answer demanding affirmative relief is filed, is a defendant to the cross-petition. It follows, therefore, under the same section, that if a cross-petition is filed in said case asking affirmative relief against a codefendant, such codefendant becomes a defendant to said cross-petition. 2 Jones on Mortgages, Sec. 1709 (4 ed.), p. 548; *Nolen v. Woods*, 12 Lea (Tenn.), 615; *Larimer v. Clemmer*, 31 Ohio St., 499.

In construing the above section of the statute, and also in commenting upon the case of *Maholm v. Marshall*, 29 Ohio St., 611, the court say: "We are all of the opinion, that in a suit of this sort, no endorsement of the summons is required, whether a personal judgment and order of sale are demanded, or the prayer is that the amount due be ascertained, and the land sold to satisfy it." Section 5097, Revised Statutes of Ohio. * *

Yet litigants are not confined or limited to the time specified in the above section for filing their pleadings. The court or a judge thereof may, for good cause shown, extend the time for filing any pleading, upon such terms as are just. Section 5098, Rev. Stat.

The section just quoted does not limit the court as to the time he may allow for filing any pleading. He may give one day, one month or six months. *Hill v. Supervisors*, 10 Ohio St., 621.

There is no doubt that there is a difference between the practice of code states and in states having no code, as to cross-bills or cross-petitions in equity. There is a difference as to what such pleadings may contain, as well as the rule days for the same.

But whatever it may be in other states, it has been fixed in Ohio, both by statute and the decisions of our highest court.

Our code authorizes a defendant to file a cross-petition asking for affirmative relief, either legal or equitable against the plaintiff, or a codefendant "touching the matters in question in the petition." Section 5074, Rev. Stat.

The statute makes no difference between plaintiffs and defendants pleading to cross-petitions. Each is given until "the third Saturday *after the cross-petition is filed*," not after the return day of the summons, nor after service of summons upon him. This language is significant. It presumes that every plaintiff and every defendant knows when a cross-petition is filed and prepares himself to plead to the same within the time given. *Bailey v. Lee*, 14 Hun, 524; 1 Bate's Pl. and Pr., 589; Bate's Pl. and Pr., 162; Bate's Pl. and Pr., Sec. 1, p. 170; *Draper v. Moore*, 2 C. S. C., 167.

We specially call the attention of the court to the case of *Brown v. Kuhn*, 40 Ohio St., 468.

The decree of the court in the Delaware common pleas settling the whole controversy between all the parties, is sustained by the policy of the law in Ohio, and other states. *Giddings v. Barney*, 31 Ohio St., 80; *Maholm v. Marshall*, 29 Ohio St., 611; *Hamilton v. Jefferson*, 13 Ohio, 427; *Boswell v. Sharp*, 15 Ohio, 447; *Myers v. Hewitt*, 16 Ohio, 449; *Moore v. Starks*, 1 Ohio St., 369; *Heller v. Meis*, 2 C. S. C., 287.

In some states, the doctrine laid down in the cases above cited has been recognized and finally embodied in the form of statutes. 2 Jones on Mortgages (4 ed.), Sec. 1709; 1 Jones on Mortgages, Sec. 755, p. 6672; *Crowell v. Hospital, etc.*, 27 N. J. Eq., 650; *Williard v. Worsham*, 76 Va., 392; 1 Jones on Mortgages, Sec. 761a; *Booth v. Insurance Co.*, 43 Mich., 299; *Unger v. Smith*, 44 Mich., 22; *Hicks v. McGarry*, 38 Mich., 667; 2 Jones on Mortgages, Sec. 1716, p. 556; 1 Wiltsie on Foreclosure, p. 107, Sec. 95.

Again, "if the grantee upon purchasing a part of the mortgaged premises, assumes a certain portion of the mortgaged debt, his liability is limited to the sum assumed. If, upon a subsequent foreclosure of the mortgage he purchase the same part of the premises already conveyed to him, the mortgagee can claim of him as a deficiency, only the difference between the sum assumed by him with interest thereon from the date at which this part of the mortgage became primarily his own debt, and the like sum paid by him at the foreclosure sale." 2 Jones Mortgages, Sec. 1713; *Commissioners v. Peter*, 32 N. J. Eq., 113; 2 Jones on Mort., Sec. 1711, p. 552; *Halsey v. Reed*, 9 Pai. Ch., 446; *Klapworth v. Dressler*, 13 N. J. Eq., 62; *Hay v.*

Brambell, 19 N. J. Eq., 563; *Stiger v. Mahone*, 24 N. J. Eq., 426.

We especially call the attention of the court to the steps taken in the Delaware county case, as being identical with those laid down in 2 Jones on Mortgages, Sec. 1709 (bottom p. 548).

DAVIS, J. The contention in this case is concerning the validity of a judgment against the plaintiff in error rendered in Delaware county, and which was made a lien by levy on his lands in Pickaway county. It is asserted that the judgment is void because it was rendered upon a cross-petition of codefendants of the plaintiff in error against him, upon which cross-petition no summons was issued, in an action by a mortgagee of the defendants praying for a judgment against the mortgagors on the mortgage notes, for a foreclosure of the mortgage, for sale of the mortgaged premises and for all proper relief, there being no relief asked for in the petition against the plaintiff in error and there being no averment in the petition on which to found relief.

The only allegation in the petition referring to the plaintiff in error is the following: "Plaintiff further says and it charges that said defendant, John Southward, since the filing of the said mortgage herein described, has purchased and is now the owner of said real estate subject to plaintiff's said mortgage, and asks that he may be notified of the filing, pendency and prayer of this petition and that he may be required to answer the same as to his interest in said real estate." Accordingly a summons was issued upon this petition and it was served upon Southward on December 3, 1889. The summons required him to answer the petition on or before December 28, 1889,

but no answer or other pleading was ever filed by Southward in that case. It is clear that upon this petition there could have been no personal judgment against Southward, either for the whole debt or for a deficiency after sale of the mortgaged premises; for the petition alleged no personal liability on his part. The only allegation against him was that he was a purchaser subject to the mortgage. He may well have been willing to allow his equity of redemption to go in satisfaction of the mortgage debt, and yet may have had a defense against a personal judgment. At any rate a personal judgment against him was not a "matter in question in the petition."

Sometime after Southward became in default for answer to the petition, his codefendants, the mortgagors, filed an answer admitting the execution of the note and mortgage by them, and by way of cross-petition alleging that Southward, when he purchased the land, assumed and agreed to pay the mortgage indebtedness to the plaintiff in the action. The prayer in the cross-petition is as follows: "These defendants * * * ask that the said premises may be ordered sold on the foreclosure of said mortgage and the proceeds of said sale be applied on the said note in plaintiff's petition described, and for all further relief." It will be noted that in this cross-petition no "relief" is claimed "touching the matters in question in the petition," except the foreclosure of the mortgage and the application of the proceeds of the sale on the mortgage note, as required by the statute as it then was, and as it remained until April 16, 1900 (Revised Statutes, Sec. 5071; 94 O. L., 281, Sec. 5067). No amendment to the petition was filed, and a prayer for a personal judgment nowhere appears in the case, and no allegation appears upon which such

a judgment could be founded, unless the plaintiff, the mortgagee, might lawfully do as it did do, after sale of the mortgaged premises on motion to confirm the sale and distribute the proceeds, have a finding made and judgment rendered against Southward, on the cross-petition of his codefendants. The court after finding that Southward was in default for answer or demurrer to the petition and the cross-petition, "and that the allegations of said cross-petition are thereby confessed by him to be true," finds and adjudges as follows: "That said John Southward has not complied with the terms of said agreement * * * and that there is due said plaintiff from said John Southward in pursuance of said agreement, the sum of \$4,787.83, with interest at the rate of seven per cent. per annum from date. Wherefore it is ordered and decreed by the court that the said John Southward pay said sum of \$4,787.83 to the plaintiff," etc. This is very clearly a judgment against Southward for the whole debt; and it might very properly have been so, if the plaintiff had pleaded the agreement by Southward to pay the debt and prayed for a judgment thereon, and he had been brought into court to answer such a claim. *Poe v. Dixon*, 60 Ohio St., 124. But in this case the plaintiff did not make the proper averments to entitle it to a judgment for the money claimed to be due. Southward was called upon to answer that petition and thereafter he was bound to take notice of all proceedings strictly germane thereto, but was not bound to keep watch for entirely new causes of action which might be foisted into the case after he had waived his right to defend against the cause of action to which he was summoned to answer. Hence the judgment rendered against Southward cannot be sustained un-

less it can be done under the cross-petition, upon which no summons was issued.

After rendering judgment against Southward for the whole debt, as above stated, the court ordered that taxes and costs should be paid and that the residue of the money arising from the sale "be applied in liquidation of plaintiff's claim as a payment thereon. And there still remaining due plaintiff from said defendant, John Southward, the sum of \$878.60 for which execution is awarded against him," etc. It has been urged in argument that this is merely an order awarding execution for the balance remaining after sale of the mortgaged property and application of the proceeds upon the plaintiff's claim. This argument does not seem to give due weight to the fact that before awarding execution for the balance, and before applying the proceeds of the sale upon the plaintiff's claim, the court found the whole debt to be due from Southward to the plaintiff and decreed that he should pay the whole amount and awarded execution therefor. This of itself has been held, in Illinois, to be error. *Rooney v. Moulton*, 60 Ill. App., 306. Nor does this argument seem to take account of the want of any averment upon which personal liability could be fixed upon Southward for any amount, except as it appears in the cross-petition.

It was pointed out by Granger, C. J., in *Brown v. Kuhn*, 40 Ohio St., 485, that "the only provision for a summons upon a cross-petition is in Sec. 5074," now Sec. 5070, Rev. Stat.; but does it follow that no summons can issue, or that none may be required, in cases other than the one provided for in that section? Is this inquiry justly to be answered by the maxim, *expressio unius est exclusio alterius*? We think not. It is a fundamental doctrine in the law of procedure that

a party who is affected by the judgment must have his day in court, which is understood to mean that he shall have due notice of the claim against him which may result in judgment, and that he shall have an opportunity to defend against it. The failure of the legislature to specifically prescribe the issue of summons, cannot deprive a party of his constitutional right to due process of law, and the legislature can not be presumed to have intended to do so. Hence, the question for consideration here is not so much what the statute provides, as whether the constitutional guaranty of due process of law has been violated. 10 Am. & Eng. Ency. Law (2 ed.), 296, and *cases there cited*. Of course if a party had an opportunity to be heard and neglected to avail himself of it, he cannot complain of any invasion of his constitutional right when there is an ultimate decision which is adverse to him. If in the present case Southward did have due notice of the claim which was ultimately formulated in a judgment against him he cannot be heard to dispute the judgment; but the whole contention turns on the question whether he did in fact have such notice. So long as a cross-petition is strictly confined to "*matters in question*" in the petition" there can be no doubt that the summons issued on the petition would be sufficient to sustain a judgment on the cross-petition; but when the cross-petition sets up matters which are not drawn in question in the petition, and seeks affirmative relief against a codefendant, of a nature totally different from that sought in the petition, we think that the plainest principles of justice and constitutional law require that the party who is to be bound by the judgment should have notice of the claim made against him, and that in such case a summons issued on the petition does

not confer jurisdiction to render judgment on the cross-petition. Besides, since the cross-petition was adopted in the code from equity procedure, if the statute is not explicit as to the procedure, the equity practice, "as modified by the spirit of the code, must be resorted to; and under the chancery practice, when a defendant sought relief against a codefendant as to matters not apparent upon the face of the original bill, he must file his cross bill making parties thereto such of his codefendants and others as was necessary to the relief sought, and process was necessary to bring them in." *Fletcher v. Holmes*, 25 Ind., 458; *Pattison v. Vaughan*, 40 Ind., 253; *Bevier v. Kahn*, 111 Ind., 200; *Edwards v. Woodruff*, 90 N. Y., 396. And see *Spoors v. Coen*, 44 Ohio St., 497, 502, 505, per *Minshall, J.* The judgment against Southward upon the cross-petition, whether it was upon the election and request of the plaintiff or not, was therefore null and void. *Spier v. Corll*, 33 Ohio St., 236; and it was competent to attack it in this proceeding. *Kingsborough v. Tousley*, 56 Ohio St., 450.

In *Giddings v. Barney*, 31 Ohio St., 80, it was held that a personal judgment cannot be taken against a mortgagor, in an action to foreclose a mortgage, unless the petition contains a prayer for such judgment. We have already emphasized the fact that in this case neither the petition nor the cross-petition contained such a prayer. In the opinion in the case last cited, Boynton, J., said: "We are not, however, to be understood as holding that in equity cases, the court may not give a personal judgment, where equity requires it. *McCrory v. Parks*, 18 Ohio St., 1; *Reed v. Reed*, 25 Ohio St., 422. Nor is it intended to deny the power of the court, in an action to foreclose a mortgage, *where the court has ac-*

quired jurisdiction of the person of the mortgagor, to award execution for any balance due, after the proceeds of the sale of the mortgaged premises have been exhausted. *Hamilton v. Jefferson*, 13 Ohio, 427; *Myers v. Hewitt*, 16 Ohio, 449, 456; *Moore v. Starks*, 1 Ohio St., 369, 373; *Maholm v. Marshall*, 29 Ohio St., 611, 615." We may add to this that judgment for such balance cannot be rendered against a person who has assumed and agreed with the mortgagor to pay the mortgage debt unless the mortgagee elects to avail himself of the agreement to pay, and the proper averments are made against the person assuming the mortgage, and the court has acquired jurisdiction over his person. *Brewer v. Maurer*, 38 Ohio St., 543, 554. In this case, as we have said, these conditions are not found, so that also upon the theory that the judgment in this case was a judgment for the deficiency, the judgment was invalid.

In *Brown v. Kuhn et al.*, 40 Ohio St., 468, one of the points decided is that where a cross-petition in error is properly filed against a party already in court, in the pending case on error, no summons in error should be issued for such party, and with that decision the court is still satisfied; but so far as remarks in the opinion of the court in that case conflict with the views here expressed, they are disapproved.

The judgments of the circuit court and the court of common pleas are

Reversed.

BURKET, SPEAR, SHAUCK and PRICE, JJ., concur.

BROWN v. GINN, TRUSTEE.

Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not real party in interest, when—Sections 4993 and 4995, Rev. Stat.—Contingent fee to collector, champertous and invalid, when.

1. A contract by which several accounts against the same debtor are assigned by the holders to another termed a trustee for the purpose of having the same prosecuted for collection by suit or otherwise, and the proceeds, after payment of costs and fees of the trustee for prosecuting the action, to be paid to the assignors in proportion as the claim of each may bear to the whole sum recovered, does not constitute such assignee the real party in interest within the purview of Section 4993, Rev. Stat., so as to enable him to maintain an action in his own name upon such accounts. Nor is he a trustee of an express trust within the meaning of Section 4995, Rev. Stat.
2. A contract assigning several accounts for the purpose of collection which gives to the assignee (an attorney) a contingent fee depending on success, to be deducted from the proceeds of a suit to collect the accounts, which suit is to be prosecuted by him in his own name and at his own risk and cost, and which also deprives the assignors of any right to control or compromise the suit, is against public policy as champertous, and is invalid.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

The defendant in error commenced an action in the common pleas of Cuyahoga, against the plaintiff in error, to recover upon eight causes of action, the first of which is in words and figures following, to-wit:

“Now comes the plaintiff herein, Frank H. Ginn, trustee, and for his cause of action against the defendant Marcus M. Brown, says: That there is due him as such trustee, from said defendant, the sum of \$100.75 for work and labor performed by Peter J. De-

Witt, for and at the request of said defendant, from August 29th to November 21st, 1896, in and about the construction of a dwelling house on Euclid Heights, Cleveland, Ohio, which amount he claims with interest thereon from November 21, 1896."

Each of the other seven was like unto this, save as to the name of the person by whom the work was done, and the amount and date. The total demanded was \$921.59 with interest.

The answer alleged that the plaintiff is not the real party in interest; that he is not the owner of any of the claims set up in the petition, but is merely the attorney who has the several claims for collection, and has no interest in them other than that. Payment of the several claims to the persons named prior to any assignment to plaintiff was also pleaded.

Plaintiff's reply denied all of the allegations of the answer.

To maintain the issues on his part the plaintiff below offered himself as a witness in his own behalf as trustee, and testified as follows:

"My name is Frank H. Ginn; I am an attorney at law, and am the plaintiff in this action. The signature to this paper which I hold in my hand, 'Frank H. Ginn, trustee,' is my signature, and Joseph O'Keefe, James Corrigan, Herman Roseman, George F. Moore, Frank Laraway, James Hogan, Peter J. DeWitt and Joseph Hedges, whose names appear upon this paper, signed the same in my presence and handed the same to me."

Which paper was offered in evidence and is as follows:

"Agreement made this 30th day of October, 1897, between Frank H. Ginn, trustee, first party, and Joseph Hedges, James Hogan, J. Corrigan, Joseph

O'Keefe, George Moore, Peter DeWitt, Herman Roseman, John D. Smith and Frank Laraway or any of them that may sign this agreement, second party.

"Witnesseth: That, whereas, the persons composing second party have claims for work and labor in different amounts, against Marcus M. Brown, and are desirous of having said claims prosecuted for collection against said Marcus M. Brown.

"Now, therefore, the persons composing second party, or any of them that may sign this agreement, hereby sell and assign to Frank H. Ginn, trustee, for the purposes hereinafter specified, severally their claims against said Marcus M. Brown. In consideration thereof, said Frank H. Ginn, trustee, agrees to prosecute said claim by suit or otherwise, against said Marcus M. Brown, and after deducting costs and attorney's fees, to account for any sum obtained from said Marcus M. Brown upon said claims to said persons signing this agreement, in proportion as the claim of each may bear to the whole sum recovered from said Brown upon said claims.

"Witness our hands this 30th day of October, A. D. 1897.

"FRANK H. GINN, Trustee.

"Signed:

"JOSEPH O'KEEFE,
"JAMES CORRIGAN,
"HERMAN ROSEMAN,
"G. F. MOORE,
"FRANK LARAWAY,
"JAMES HOGAN,
"PETER J. DE WITT,
"JOSEPH HEDGES."

And thereupon plaintiff rested his case. Defendant offered evidence tending to prove payment; plaintiff gave in rebuttal evidence to controvert the new matter, and the cause was submitted. The jury thereupon returned a verdict, for the plaintiff for \$1,077.28, on which judgment was rendered, which was affirmed by the circuit court. To reverse those judgments the defendant below brings error.

Mr. Charles E. Pennewell and *Mr. W. W. Boynton*, attorneys for plaintiff in error, cited and commented upon the following authorities:

Railway Co. v. Volkert, 58 Ohio St., 362; *Reece v. Kyle*, 49 Ohio St., 475; *Pennsylvania Co. v. Lombardo*, 49 Ohio St., 1, 5; *Stewart v. Welch*, 41 Ohio St., 483; Sec. 4993, Rev. Stat.; *Railway Co. v. Strader*, 29 Ohio St., 448; 28 Am. & Eng. Enc. Law (1 ed.), 53; 18 Am. & Eng. Enc. Law (1 ed.), 158, and authorities cited; *Dodge v. Swazey*, 35 Me., 535; *Wharton v. King*, 69 Ala., 365; *Patrick v. Petty*, 83 Ala., 420; 18 Am. & Eng. Enc. Law (1 ed.), 154, note; *Jones v. Snow*, 64 Cal., 456; Sec. 5114, Rev. Stat.; *Ralston v. Kohl*, 30 Ohio St., 92; *Piatt v. Longworth*, 27 Ohio St., 159; *Tarbox v. State*, 38 Ohio St., 581; *Benninger v. Hess*, 41 Ohio St., 64; *Dudley v. Iron Co.*, 13 Ohio St., 168; *Banta v. Martin*, 38 Ohio St., 534; 28 Am. & Eng. Ency. Law (Ohio), (1 ed.), 54-60; *Moore v. Stadden*, Wright (Ohio), 88; *Peabody v. Peters*, 5 Pick., 1; *Fales v. Reynolds*, 14 Me., 89; *Briggs v. Richmond*, 10 Pick., 391; *Case v. Boughton*, 11 Wend., 106; 18 Am. & Eng. Enc. Law (1 ed.), 155; *Strong v. Kennedy*, 40 Mich., 327; *Cody v. Bemis*, 40 Wis., 666; *Richabaugh v. Dugan*, 7 Pa. St., 394; 6 Enc. Pl. & Pr., 206; *Louden v. Birt*, 4 Ind., 566; *Swett v. Southworth*, 125 Mass., 417; *Hamilton v. Moore*, 4

Watts & Serg. (Pa.), 570; *Farmers' Bank v. Sherman*, 33 N. Y., 69-79; 6 Enc. Pl. & Pr., 207; 6 Enc. Pl. and Pr., 209; *McLaughlin v. Webster*, 141 N. Y., 76.

Messrs. Blandin, Rice & Ginn, for defendant in error, cited and commented upon the following authorities:

Key v. Vattier, 1 Ohio, 132; *Weekly v. Hall*, 13 Ohio, 167; *Stewart v. Welch*, 41 Ohio St., 483; *Reece v. Kyle*, 49 Ohio St., 475; *Pennsylvania Co. v. Lombardo*, 49 Ohio St., 1; *Railway Co. v. Volkert*, 58 Ohio St., 362; *Pomeroy's Rem.* (2 ed.), Secs. 125, 147, 171, 178; *Hays v. Gas Light & Coal Co.*, 29 Ohio St., 330, 331; *Hotel Co. v. Wiatt*, 1 Circ. Dec., 34; 1 C. C. R., 55; *Hotel Co. v. Wiatt*, 44 Ohio St., 32; *Kinthead's Code Pl.*, Sec. 9; *Allen v. Brown*, 44 N. Y., 228; *Wayne v. Miner*, 6 Re., 602; 7 Am. L. Rec., 9; *Cottle v. Cole*, 20 Ia., 481, 482; *Knadler v. Sharp*, 36 Ia., 232; *Bean v. Green*, 33 Ohio St., 444.

Mr. W. W. Boynton, also for plaintiff in error, argued the case orally.

SPEAR, J. The question at the threshold is whether or not the action is maintainable by the plaintiff below in his own name? Our statute, section 4993, provides that "an action must be prosecuted in the name of the real party in interest," except as provided in the two following sections, and the pertinent provision of the exceptions is that "a trustee of an express trust, a person with whom, or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted." It is not supposed that any other provision of the statute aids the plaintiff below. If he is not the real party in interest then his right to maintain the action must rest upon one or the other of the two exceptions quoted. It would be difficult to

conclude that he is the real party in interest when his relation to the accounts declared on is contrasted with that of the others who claim to have performed the labor and to have earned the sums sued for. Prior to the making of the contract he had no possible interest in the subject-matter. By the contract he acquired an apparent beneficial interest to the extent of his fees for services yet to be rendered, and none other. That is, it was a contingent interest. If the effort to collect fails, he loses compensation for the work done, and the costs made by him, and the other parties to the contract, if bound by the result, lose their entire claims. If he succeeds he gets only compensation for his professional labor with immunity from costs, and they get the whole of what remains. It may be admitted that the plaintiff is a party in interest, but it seems hardly reasonable to assume that, in this situation, the plaintiff is *the real party in interest*, and we are of opinion that he is not. We are aware that the tendency of some courts has been to uphold actions brought upon negotiable instruments, transferred for collection only, on the ground that the plaintiff is the real party in interest, and that there are some authorities which point to that conclusion. Indeed it may be admitted that the trend in some of the code states is in that direction. But we have found no case which goes to the extent of holding that an assignment of an open account for the mere purpose of collection, one which gives the assignee a contingent interest only, constitutes him the real party in interest within the meaning of the statute.

Can this contract be regarded as one made for the benefit of another? We think not. The language implies that that other must be a third person. Here

the contract, by its terms, is for the benefit of the person who is making it, and indeed it is but justice to say that the learned counsel for the defendant in error do not insist that it is such contract.

Is it, then, the creation of an express trust within the meaning of the statute? True the language of the paper evinces an intention to create a trust. It uses the word "trustee." It points out the persons, the property and the purpose. But what warrant is there for saying that this statute can mean that an express trust can be created for the purpose only of collecting an account? The controlling rule, given as the general rule at the beginning of the chapter, is that a suit to collect such *choses in action* must be prosecuted in the name of the real party in interest. We have found that, as we believe, by no fair test can Ginn be regarded as the real party in interest. If this conclusion be right, is it conceivable that, having prescribed this as the controlling rule, the law-makers would proceed, in a cognate section, to authorize an exception which would practically nullify and take away the plain beneficial rule thus established? And of what avail would be a requirement such as is here provided if its manifest purpose could be defeated by a paper such as forms the basis of the action in the case below? We conclude that the claim of an express trust cannot in this case be maintained, for it is a settled rule that a valid trust cannot be founded upon a contract in contravention of the general policy of the law. Hill on Trustees, 45; Lewin on Trusts, 19; *Prosser v. Edmonds*, 1 Y. & C., 481. And we conclude further, that, in order to constitute the party a trustee of an express trust within the meaning of section 4995, the right and duty to bring an action must be incidental to other powers and duties under the as-

sumed trust, and the authority not confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and pay the net proceeds over to the assignor. Such a contract is rather one of agency; it is not one which creates an express trust within the meaning of this statute.

It is to be observed, also, that these eight creditors were not joint owners of all the claims, but were several owners, each of his own. Neither had any interest in the claim of any other. Nor were the claims connected with one another. Each rested on its own peculiar facts. The parties could not, therefore, have joined in one action in their own names. Why should they be permitted, by agreeing to create a joint trustee, to collect their several claims in one suit? The transaction bears the appearance of an effort to evade the statute regulating the joinder of causes of action. Possibly, under the condition of the pleadings, this is not a fatal objection, but it is, after all, not without weight.

We have not overlooked the case of *White v. Stanley*, 29 Ohio St., 423. The material question involved there was the right of the plaintiff to maintain the action in his own name. The syllabus states the case thus: "The debtor of a bank, of which A was cashier, transferred a negotiable note in payment of his indebtedness, to A by special endorsement, and thereupon the bank, to enable A to bring suit thereon, assigned its interest in the note to him. Held, that A might maintain an action in his own name, notwithstanding he may be accountable to the bank for the proceeds when collected." The endorsement was in the usual form, and directly to A individually; not as cashier. His legal title did not, therefore, at all

depend upon any assignment from the bank; that ceremony was quite beside the question and was wholly unimportant. It is observed by McIlvaine, J., in the opinion, that "whatever the rule may be in a case where an endorsement of a negotiable instrument is made for the mere purpose of collection, it is quite clear that this is a very different case." And manifestly this was correct. It is true that the opinion sustains the right of the plaintiff to maintain the action on the provisions of section 27 of the code, now section 4995. But it is clear that the conclusion reached and the judgment rendered by the court may rest, beyond any question, upon the provisions of the act of February 20, 1820, known as the "Negotiable Instrument Act" (S. & C., 862), now section 3172, Revised Statutes, which in terms gives authority to the endorsee of any such instrument to institute and maintain an action upon it in his own name. See, also *Nichols v. Gross*, 26 Ohio St., 425.

But there is another difficulty with the case of the plaintiff below. As before stated, his case rests wholly on the written contract introduced by him in evidence. Prior to its execution he had no connection with the assignors, and had been in no way instrumental in the creation of their claims. That paper contemplates, nay, it provides for, the prosecution for collection of the several claims against Brown. It purports to sell and assign the claims to Ginn. The prosecution was to be in his name, and the suit was so brought. Such prosecution made him liable for the costs. He was, in that situation, bound to pay them, and if he was the owner of the claims no one else was liable in any event. The distinct provision is that the costs and attorney's fees are to come out of the recovery. That is, the second parties are not to pay

them. So that, by the terms of this agreement, the attorney was to prosecute an action in his own name, at his own risk and expense and receive his compensation out of the recovery, thus purchasing disputed claims and stirring up litigation. Again, if this paper affected the object, and was a real transfer of these accounts to the attorney, the several parties of the second part thus parted with all right to control the litigation or to compromise it without the consent of the attorney, and this inability was made doubly so by the fact that no one of the second parties had any sort of interest in the portion of the demand which rested upon the services of any other. Upon all the authorities such an arrangement is champertous, and will not be maintained by the courts. See *Stewart v. Welch*, 41 Ohio St., 483; *Pennsylvania Co. v. Lombardo*, 49 Ohio St., 1, 5; *Reece v. Kyle*, 49 Ohio St., 475; *Railway Co. v. Volkert*, 58 Ohio St., 362. So that if the agreement vested in the attorney the legal title to the accounts so as to constitute him the real party in interest, and thus enable him to bring an action in his own name, such action cannot be maintained because against public policy, while, if he is not, within the meaning of section 4993, the real party in interest, the case would fail for that reason.

Other errors are assigned, but they are, in view of the conclusion announced, unimportant.

It follows that the judgments below are erroneous. They will be reversed and the petition of plaintiff below dismissed.

Judgment accordingly.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY v. KISTLER.

Action to recover for injury by passing train—Statement required in allegation—Rule as to rate of speed for trains, in absence of statute—Duty of watchfulness required of person approaching tracks—Duty of locomotive engineer approaching road crossing—Bearing of obstructions to view on roadside—Doctrine of imputed negligence—Rule as to negligence of one being negligence of all.

1. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, and a motion is made to require such pleading to be made definite and certain, it is error to overrule such motion.
2. In an action founded upon negligence, the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and that statement being made, it is sufficient to aver that such acts were carelessly or negligently done, or omitted.
3. In the absence of a statute regulating the rate of speed of railroad trains, it is not negligence for a railroad company to run its trains, in the open country, at such rate of speed as those in charge of the same may deem safe to the transportation of passengers and property, unless there are facts and circumstances which, when taken in connection with a high rate of speed, would make such speed an element or factor in constituting negligence, and in such cases such facts and circumstances should be pleaded.
4. As between a person about to cross over a railroad at a crossing, and a train of cars approaching such crossing, the train has the right of way. This is so because the person can stop within a few feet, and the train cannot.
5. The looking required before going upon a crossing, should usually be just before going upon the track, or so near thereto as to enable the person to get across before a train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach such crossing.
6. It is the duty of a locomotive engineer to keep a lookout on the track ahead of the train. If while so doing his eye takes in a person approaching the track, he may assume that such

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person will keep away from the track until the train passes; but when it becomes evident that such person will not keep off the track, it becomes the duty of such engineer to use ordinary care to prevent injury to such person, his first and highest duty, however, being for the safety of the passengers and property in his charge for transportation.

7. As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right of way, it is not required to take such things into consideration when approaching a crossing.
8. While the doctrine of imputed negligence does not prevail in this state, yet where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, must be regarded as the negligence of all.
9. Whatever a locomotive engineer, and those with him on the engine, would see while in the proper discharge of their respective duties, they are chargeable with having seen.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Sandusky county.

On the morning of June 2, 1892, Annie Kistler, defendant in error, and her father were driving west on the county line road between Seneca and Sandusky counties, in a buggy drawn by two quiet farm horses, the side and rear curtains being down, the latter being loose at the bottom. Her father was very deaf, and it was his custom to take one of his children along to hear for him, and he had taken Annie along that morning for that purpose.

He was aged fifty-seven years, strong and in good health. The county line road crossed over the track of the New York, Chicago & St. Louis Railroad at grade, and at an acute angle, the railroad running a little south of west and the wagon road running east and west.

As the father and daughter were on the crossing they were struck by a freight train composed of an engine, four cars and a caboose going southwest at a

speed of from twenty to forty miles an hour. The father was killed and the daughter badly injured, and this action was brought by her against the railroad company for the recovery of damages.

At a distance of 216 feet east of the crossing, a road known as the "Ridge Road," crosses the county line road, and running in a northeast direction, crosses the railroad at a point 346 feet from the crossing of the county line road over the railroad.

At a distance of eighty-nine rods east of the crossing, is the west line of a tract of fifteen acres of woodland, lying between the county line road and the railroad.

Just east of the ridge road and partly on the right of way of the railroad and partly on the land adjoining on the south, there stood a wild cherry tree which the evidence tended to show to be eight to twelve inches in diameter, thirty feet high, with a broad bushy top from twenty-five to thirty feet in diameter, and the branches coming within three to eight feet of the ground.

Along the east side of the ridge road and about twenty feet south of the cherry tree, there was a locust tree about the same size as the cherry, with some sprouts around it from four to twelve feet high.

There were also some weeds three or four feet high along the ridge road, and along at that place there was a small cut two to three feet deep, and thence to the crossing where the accident occurred, the county road and railroad were on a level. There were no other or further obstructions. She had often passed there and knew the situation.

The county road was sandy, and it had rained a little the previous night, and the air was clear with a slight breeze from the northeast.

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The father sat on the right side and drove the team, and as they passed the woods he told her that they were nearing the railroad, and requested her to look and listen for trains, which she did by raising the rear curtain some three times before reaching the ridge road. After passing that road she remembers nothing, but within one hundred feet of the crossing the father was seen to bend forward and look out toward the railroad.

The team was going on a slow trot until it passed over the ridge road, and then it went faster, one horse trotting and the other galloping till they reached the crossing, but whether the driver was urging them ahead to get over the crossing ahead of the train, or whether he had partly lost control of them, is left in doubt by the evidence.

There was no slacking of the speed of the train, and the engineer did not see them before the collision, but the evidence tends to prove that the fireman and a brakeman on the engine, and the conductor, brakeman and foreman on the caboose, saw them, when the team was within about one hundred feet of the crossing.

It is conceded that a whistle for the crossing was given, but she claims that it was not given at the proper place, and that it was not given until after passing the ridge road, and that it scared the horses and caused them to increase their speed. The evidence as to the signal by whistle is conflicting. The bell seems to have been rung.

The petition avers that the railroad company negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate and dangerous rate of speed, and negligently and carelessly omitted to give proper

and sufficient signals or warning of the approach of said locomotive and train to said crossing, and of the existence of said crossing, and negligently and carelessly allowed and maintained obstructions to a proper view of its said train, locomotive and railroad and negligently and carelessly operated and handled its said locomotive and train of cars.

The railroad company filed a motion to compel her to make her petition definite and certain as to the acts of negligence charged, and particularly to state the facts in regard to the defendant negligently and carelessly operating and handling said locomotive and train, and to strike out the words "at a high, immoderate and dangerous rate of speed."

The court of common pleas overruled the motion, to which the defendant below excepted.

The answer was a general denial as to the negligence charged, and a plea of contributory negligence on her part. She denied the contributory negligence in her reply.

She recovered a judgment on the first trial which was reversed by the circuit court, and upon another trial she again recovered a verdict. A motion for a new trial was overruled and judgment entered on the verdict. Proper exceptions were taken throughout the case. The circuit court affirmed the judgment, and thereupon the railroad company came here seeking to reverse the judgments of the courts below.

Messrs. C. P. & L. W. Wickham and Mr. John H. Clarke, for plaintiff in error, cited and commented upon the following authorities:

Railway Co. v. Walker, 113 Ind., 196; *Railway Co. v. Maurer*, 21 Ohio St., 421; *Railroad Co. v. Stallman*, 22 Ohio St. 1; *Cordell v. Railway Co.*, 70 N. Y.,

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119; *Railway Co. v. Rogers*, 40 S. W. Rep., 956; *Railway Co. v. Hinds*, 56 Kan., 758; *Dillingham v. Parker*, 80 Tex., 572; *Railroad Co. v. Houston*, 95 U. S., 697; *Gilbert v. Railway Co.*, 97 Fed. Rep., 747; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66; *Railway Co. v. Elliott*, 28 Ohio St., 340; *Railway Co. v. Whitacre*, 35 Ohio St., 627; *Harrah v. Jacobs*, 1 L. R. A., 152; *Railway Co. v. Creek*, 49 A. & E., 451; *Brickel v. Railway Co.*, 42 A. & E., 107; *Larkin v. Railway Co.*, 85 Ia., 492; *Railway Co. v. Harris*, 22 Tex. Civ. App., 16; *Railway Co. v. Kistler*, 9 Circ. Dec., 277; 16 C. C. R., 316.

Messrs. Finch & Dewey and *Messrs. King & Guerin*, for defendant in error, cited and commented upon the following authorities:

Farmer v. Railway Co., 60 Ohio St., 36; 2 Bates Pl., 615; *Davis v. Guarnieri*, 45 Ohio St., 470; *Hazen v. O'Connor*, 8 Circ. Dec., 87; 14 C. C. R., 529; *Duffy v. Railway Co.*, 32 Wis., 269; *Nehrbas v. Railway Co.*, 62 Cal., 320; *Improvement Co. v. Stead*, 95 U. S., 161; *Railway Co. v. Goetz*, 79 Ky., 442; 18 Am. & Eng. R. R. Cases, N. S., 159; *Railway Co. v. Rogers*, 40 S. W. Rep., 956; *Mackay v. Railroad Co.*, 35 N. Y., 75; *Richardson v. Railroad Co.*, 45 N. Y., 846; *Cordell v. Railroad Co.*, 70 N. Y., 119; *Railroad Co. v. Schade*, 8 Circ. Dec., 316; 15 C. C. R., 424; *Robison v. Gary*, 28 Ohio St., 241; *Taylor v. DeBus*, 31 Ohio St., 471; *Railway Co. v. Murphy*, 50 Ohio St., 143; *Cosgrave v. Railway Co.*, 87 N. Y., 68; *Railway Co. v. Van Horn*, 12 Circ. Dec., 106; 21 C. C. R., 337; 2 *Shearman & Redfield Neg.*, Sec. 169; *Beisegel v. Railway Co.*, 34 N. Y., 622; *Sackett's Instructions to Juries* (2 ed.), 405; *Wharton on Neg.*, Sec. 386; *Artz v. Railway Co.*, 34 Ia., 153; *Railway Co. v. Keeley*, 23 Ind., 133; *Tabor*

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v. *Railway Co.*, 46 Mo., 353; *O'Mara v. Railway Co.*, 38 N. Y., 445; *Schweinfurth v. Railway Co.*, 60 Ohio St., 215; 1 Shearman and Redfield on Neg., Sec. 94; 2 Thomp. on Neg., 1151; *Railway Co. v. Anderson*, 11 Circ. Dec., 765; 21 C. C. R., 288; *Railway v. Harmon*, 47 Ill., 298; *Railway v. Dickson*, 88 Ill., 431; *Railway v. Newscome*, 60 Ga., 492; *Railway v. Kilips*, 88 Pa. St., 405; *Carraher v. Bridge Company*, 100 Cal., 177; *Railroad v. Stanger*, 32 N. E. Rep., 209; 7 Ind. App., 179; *Railway Co. v. Wright*, 43 N. E. Rep., 688; *Prescott v. Railway Co.*, 113 Mass., 370n.; *Pollock v. Railway Co.*, 124 Mass., 158; *Railway Co. v. Barnett*, 59 Pa. St., 259; *Railway Co. v. Stinger*, 78 Pa. St., 219; *Hart v. Railway Co.*, 56 Ia., 166; *Voak v. Railway Co.*, 75 N. Y., 320; *Railway Co. v. Yundt*, 78 Ind., 373; *Strong v. Railway Co.*, 61 Cal., 326; *Rupard v. Railway Co.*, 88 Ky., 280; *Favor v. Railroad*, 114 Mass., 350; *Lonergan v. Railway Co.*, 87 Ia., 755; *Ransom v. Railway Co.*, 62 Wis., 178; *People v. Railroad*, 13 N. Y., 78; *Wakefield v. Railway Co.*, 37 Vt., 330; *Pollock v. Railway Co.*, 124 Mass., 158; *Norton v. Railway Co.*, 113 Mass., 366.

BURKET, J. Section 5088, Revised Statutes, provides that: "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

This means that the court shall in a proper case require the pleading to be made definite and certain. It is not a mere matter of discretion. It is a substantial right to a party to have the pleading against him so definite and certain as to enable him to know what he has to meet, and to prepare his evidence accordingly.

The charge of negligence against the company that it "negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate and dangerous rate of speed," and "negligently and carelessly operated and handled its said locomotive and train of cars," gave no definite or certain notice to the company as to what acts of commission or omission claimed to be negligent would be attempted to be proved or relied upon at the trial, and therefore the petition should have been required to be made definite and certain by stating the acts of commission and omission claimed to have caused the injury, so as to advise the company as to the facts claimed to have been negligently done or omitted, and to enable it to meet the same. Upon the trial the evidence should be confined to the acts of negligence so specifically and definitely averred in the petition. This is in accordance with the rule of pleading laid down in *Davis v. Guarnieri*, 45 Ohio St., 470. It was there held that the fact claimed to have caused the injury being averred, it was sufficient to state that it was negligently done. But to say that the company "negligently and carelessly operated and handled its said locomotive and train of cars," avers no fact as causing the injury, and does not aver that any fact causing the injury was carelessly done or omitted. It is a general averment at large of negligence, and the court erred in overruling the motion to make definite and certain.

The court also erred in refusing to strike out the words, "at a high, immoderate and dangerous rate of speed."

As the general assembly has the power to reasonably regulate the speed of trains, not only in cities, but also in the country, and has failed to exercise that

power, as to speed in the country, such failure is an implied warrant to railroad companies to run their trains in the open country at such rate of speed as those in charge of the same may deem safe to the transportation of passengers and property, such safety however being the paramount consideration.

As there are road crossings in the country every few miles, it is inconsistent with proper speed of transportation, that trains should slack up for such crossings. Safety is secured to persons at such crossings by the observance of the statutory signals, and such signals being given, the train is not limited as to speed.

It has sometimes been held, and correctly, that a high rate of speed when taken in connection with other facts and the surrounding circumstances, may become an element or factor in constituting negligence; but when such is the case, the facts constituting such surrounding circumstances should be pleaded, so that the court can judge from the pleadings whether the high rate of speed is a proper factor in constituting negligence, because a high rate of speed alone cannot constitute negligence as a matter of law. Elliott on Railroads, in section 1160, says: "In the absence of any statute or ordinance upon the subject, no rate of speed is negligence *per se*." The same doctrine is laid down in section 1873 of Commentaries on the Law of Negligence by Thompson.

The petition shows no fact making this crossing dangerous, or other than the usual country road crossing, and no fact or circumstance, which, when combined with a high rate of speed, would constitute negligence. The court should therefore have stricken out those words as to speed. The case of *Railroad Co. v. Lawrence*, 13 Ohio St., 66, is instructive as to the question of speed of trains. The injury in the case of

Schweinfurth v. Railway Company, 60 Ohio St., 215, occurred at a street crossing in a city where there was an ordinance regulating the rate of speed, and it was there held that under the circumstances of that case, a high rate of speed, contrary to the provisions of the ordinance, might constitute an element in determining the question of negligence; but at road crossings in the country, where there is no law regulating the rate of speed, the rule does not prevail.

At the close of the evidence and before argument, the court upon request of counsel for plaintiff below, gave to the jury the following charge:

"The jury are instructed that the defendant railroad company had, at the time of the collision complained of, the same right to use that portion of the public highway over which its track passed at the point of collision that the public had. Its rights and those of the plaintiff were mutual, and reciprocal, and the railroad company and the plaintiff were bound to have due regard each for the safety of the other."

This charge was too strongly in her favor. While in law she had the same right to use the crossing that the railroad company had, the different modes of such use constitute a difference in right. As she could stop with her team within a few feet, and the train could not stop short of many rods, it follows of necessity that when both were approaching the crossing at the same time, the train had the right of way, and it was her duty to stop and let the train pass before attempting to cross. Commentaries on Law of Negligence by Thompson, section 1611. *Continental Improvement Company v. Stead*, 95 U. S., 161, 163. Such would be the conduct of all men of ordinary care under such circumstances. To rush ahead and at-

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tempt to pass knowing the train to be close at hand, is not the conduct of ordinary prudent persons, but is gross negligence. To drive upon a crossing without first looking for passing trains is also negligence. The looking should usually be just before going upon the crossing, or so near thereto as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track, even though there was a looking farther away when no train was seen approaching. A train at the usual speed will go quite a distance, while a team on a walk or trot will go a much shorter distance. The care to be taken in such cases should correspond with the danger.

The court in the special charges given at the request of plaintiff's counsel, in speaking of the duty of those in charge of the train to use care in discovering the plaintiff as she approached the crossing and using means to prevent injury to her, includes all the trainmen without explaining the duties of any of them, but puts upon all the duty of caring for her so as to prevent injury. Three of the trainmen were in the caboose away from the engine, and without means of immediate communication with the engineer, and yet they are included in the instruction as to trainmen, when they could do nothing to prevent the accident. The engineer also is a trainman, and the charge imposes upon him along with the other trainmen the duty of seeing her danger and being careful to shield her as she approached and drove upon the crossing.

It is the duty of an engineer on a train to keep a lookout on the track ahead of him, and he is not expected to see anything on the sides of the right of way

farther than his eye may take in objects within the range of vision while looking ahead along the track. Elliott on Railroads, sections 1159 and 1205. Commentaries on the Law of Negligence by Thompson, section 1592, *et seq.* In *Railroad Company v. Elliott*, 4 Ohio St., 474, 476, this court held that "The paramount duty of a conductor of a train is to watch over the safety of the persons and property in his charge." The same is true of an engineer. His paramount and first duty is to watch over and guard the safety of the persons and property in his charge, and that is most effectually done by keeping a strict lookout ahead along the track, so as to see any obstruction at the earliest moment, and thus be prepared to avert danger to his train. So important is this duty of the engineer to keep a lookout ahead of his train, that in some of the states it is required and regulated by statute. His duty being to look ahead, it cannot be his duty to look at the same time to the sides. If, however, while so looking ahead his eye takes in a person approaching the track at a crossing or elsewhere, he is then bound to use ordinary care to prevent injury, his first care however being for the safety of his passengers and property on board for transportation. He may presume that such person will keep away from the track until the train passes, but when it becomes evident that the person cannot or will not keep away from the track, then he must do all he reasonably can to prevent injury.

Upon the trial of this case it was urged by counsel for plaintiff, that she was discovered by the trainmen in the act of going upon the crossing in time for the engineer to have so slowed down his train after such discovery as to have prevented the injury. The rail-

road company claimed that she was not seen by the engineer until the collision occurred, and that it did not become evident to the brakeman and fireman on the left hand side of the engine, that she was about to drive upon the crossing, until the very moment of the collision, and that it was then too late to notify the engineer. It was with reference to these different claims that the special charges were given.

It has often been held by courts that when a person suddenly finds himself in a position of imminent peril or danger he cannot be held to a strict account as to the course of conduct to be by him pursued to avoid injury. *Railroad Company v. Mowery*, 36 Ohio St., 418; Elliott on Railroads, section 1173; *Railroad Co. v. Snyder*, 55 Ohio St., 342.

While engineers of locomotives are expected from their training, experience, and the nature of their duties, to be equal to almost any emergency in the management of their trains, yet it must be remembered in their favor that they have mind and nerves the same as other people, and that when they are suddenly and unexpectedly confronted with imminent peril or danger to themselves or to the persons and property in their charge, by obstructions on the track or about to go thereon, they cannot be held to a strict course of conduct to prevent injury to persons or property not connected with the train, so that the action taken is in good faith, and at the time believed to be the best. When a person or animal is seen approaching the track, and it becomes evident that he or it will not stop but attempt to cross, it is sometimes safer to slow down or stop the train, and sometimes safer to increase the speed and get the train across first. The course to be pursued must be instantly determined by the engineer at the peril of himself and

the persons and property in his charge, and the course selected by him and carried out in good faith in the face of such peril, and in view of the surrounding circumstances, cannot constitute negligence on his part, even though others might be able to suggest and point out afterwards, that a different course would have been less liable to result in injury. As to the persons and property in his charge, the engineer must use the greatest care, but as to persons and property not connected with the train, he must use only ordinary care. He must therefore be allowed to determine for himself in good faith upon the spur of the moment and in view of the peril before him, the course to be pursued for the safety of the persons and property in his charge, without being called to a very strict account by those to whom he owes only ordinary care.

What was said by this court in *Express Co. v. Smith*, 33 Ohio St., 511, at page 519, is applicable to such cases: "There is an *ex post facto* wisdom, which, after everything has been done, without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best light afforded."

At the request of the plaintiff below, the court also charged the jury in different forms before argument, to the effect that the jury must determine from the evidence under the instruction of the court, whether plaintiff in approaching the crossing used such care as persons of ordinary care and prudence would use under like or similar circumstances. Sometimes the word "evidence" was left out. These charges were all defective

Railroad Co. v. Kistler.

at least in this : the question was put as to *approaching* the crossing, instead of going onto the crossing. She may have been ever so careful in the approach, and yet extremely negligent in driving upon the crossing in the face of a rapidly approaching train. If she was negligent in going upon the crossing in front of a rapidly approaching train, thinking that she could cross in safety, and the engineer after seeing her was negligent in not slowing down or stopping his train, thinking that she would get across in safety, the proximate cause of the injury was the miscalculation and negligence of both, and there could be no recovery, unless the engineer after he saw her and realized her danger, had time to so slow down or stop as to prevent the injury. Or if the fireman and brakeman riding on the left side of the engine saw her, and saw and realized her danger in time to notify the engineer in time to enable him to so slow down or stop the train as to have prevented the injury, and failed to so notify the engineer, such failure would be such negligence as would sustain a recovery ; but if, after it became evident to them that she was about to drive upon the crossing, there was not time to notify the engineer, and then time for him to so slow down or stop the train as to prevent the injury, there could be no recovery.

When the fireman and brakeman saw her driving toward the crossing, they had a right to rely that she would use due care and not go upon the crossing, and it was only when it became evident that she was going upon the crossing that the duty devolved upon them to notify the engineer, and if there was then time to save her, she should have been saved ; but if it was then too late to save her, the injury was, as to the railroad company, an inevitable accident, and for

such there can be no recovery. If on her part it was a race to beat the train over the crossing, the injury was her own fault and there could be no recovery. It is urged that there was a deep ditch on one side of the road and a fence on the other, and that she could not turn her team around. But no effort is shown to turn the team, and besides it is always safer to run into a fence or even a deep ditch than onto a railroad crossing in front of a fast train.

There were no facts or surroundings plead or proven, which, when taken in connection with a high rate of speed, would make such speed an element or factor in negligence, and therefore what was said as to such high rate of speed in the charge was error.

Whatever the engineer and those on the engine with him, would see while in the proper discharge of their duties, they are chargeable with having seen, but they are not required to neglect their duties on the train to look outside of the right of way for approaching persons or animals, not within the range of vision while looking ahead along the track.

After argument the court charged the jury as follows:

"The defendant had the right to run the train at the time and place of this collision at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all the circumstances surrounding that crossing, affecting the traveling public and having a due regard for the safety of the public using the crossing."

From what has already been said as to the speed of trains, it will readily be seen that the latter part of this charge, all after the word "manner," is erroneous.

The court also charged the jury that if trees, shrubbery or weeds presented an obstruction to view, it required care and caution on part of plaintiff and defendant according to their respective rights as explained by the court. The inclusion of the defendant in this charge was error. The trees, shrubbery and weeds outside of the right of way, imposed no care or caution upon the company in running its train.

The court also charged the jury as follows:

"While it is true that the railroad company is not responsible for weeds or bushes growing outside of its right of way, even though they obstruct a view by travelers upon the highway, yet, if you find from the evidence such weeds or bushes to have existed in such manner in this case, it is a circumstance which the jury should consider in determining whether or not the railway company was guilty of negligence in approaching this crossing of the county line at the rate of speed at which it approached the same with its train upon this occasion."

This charge was clearly error, because the weeds and brush in question were not a circumstance to be considered by the jury in determining the question of negligence.

The court also in charging as to the duty of the company and its servants after seeing her danger, included the trainmen. This was too broad, as it included those in the caboose who could do nothing to avert the injury.

The court also charged the jury that the question of negligence was wholly for the jury to determine from the evidence. He should have added "under the instructions of the court."

The court also charged the jury that the negligence,

if any, of the father was not imputable to the daughter. While it is true that the doctrine of imputed negligence does not prevail in this state, that doctrine was not applicable to the facts as claimed to be by the defendant in this case, and as the evidence tended to prove. The father being nearly deaf, took the daughter along to hear for him, and as they came to the west side of the piece of woods, he told her to look and listen for trains, and she did so by raising the rear curtain and looking in the direction of the railroad.

If it be true that she was to do the listening, and also to assist in the looking while he was doing the driving, they were engaged in a joint enterprise, and each would in such case be chargeable with the negligence of the other.

It has often been held that the negligence of a servant is imputable to the master, because he is the superior. *Street Ry. Co. v. Wright*, 54 Ohio St., 181. On principal and sound reason the rule should be applied to those who take an active part in a joint enterprise.

As to the wild cherry tree standing in the south line of the railroad right of way east of the ridge road, it is difficult to see how it could be an obstruction to her view of the train at the time of going upon the track, because the train was then far west of the cherry tree, and the tree was behind the train. The time to look and listen for the last time is shortly before going upon the track as before explained, and as the train was near enough to catch her before getting over the crossing at a fast trot or gallop, the train must have been far past the cherry tree when she should have looked the last time. If she saw the

cherry tree as she drove by it, or knew of its being there, it only imposed upon her greater care and caution if she regarded it as an obstruction to her view. *Penn. Co. v. Morel*, 40 Ohio St., 338.

Judgment reversed.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

THE UNION CENTRAL LIFE INSURANCE CO. v. HOYER.

Contract of employment—May be discharged as to employer by assumption of third person—With knowledge and consent of employe—Consent may be by parol or implication—Duty of court in charging jury as to implied novation of contract—Law of contracts—Rules of court procedure.

1. A written contract whereby one party employs another to render services for a fixed period and at a stated rate of compensation, may be discharged as to the employer by the assumption of its obligations to the employe by a third person with the knowledge, consent and to the acceptance of the employe, and such consent and acceptance may rest in parol.
2. The consent to and acceptance of the terms of such contract of novation, need not be express, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter.
3. Where such facts, circumstances and course of conduct are in dispute between the parties, it was error for the court to refuse to charge the jury, that the consent to and acceptance of the terms of the contract of novation as to him, might be implied from the attending facts and circumstances and the conduct of the parties thereafter; and it was error to charge in its stead, that the new contract was not binding upon the employe unless he was a party to it, or agreed to accept under it.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Franklin county.

Douglas F. Hoyer, defendant in error, by virtue of a written contract for that purpose, dated Jan-

uary 13, 1891, became the agent of the plaintiff in error to render services exclusively for it, in Holmes and Knox counties, the service to consist of canvassing for applications for insurance in said company and the collection and paying over premiums on such insurance when effected. The term of said service was fixed at five years, and according to the contract set out in the petition, the plaintiff below was to make monthly reports of his transactions for the company and remittances of moneys collected to W. E. Hoyer, who was its general agent.

It was stipulated in the contract that if the plaintiff failed to comply with any of its conditions, duties and obligations; or, should the amount of new business secured by the agent, prove insufficient, or unremunerative, in the opinion of the officers of the company; or, if the agent failed to conduct his business in a satisfactory manner, the company could terminate the contract. The compensation for the agent was agreed to be a certain commission upon the premiums paid to the company on policies effected by him, and in addition to such commissions, the insurance company guaranteed to the plaintiff sixty dollars per month and his necessary traveling expenses when on business for the company, and in case the commissions exceeded the amount so guaranteed and expenses, at the end of the year, the excess should belong to the agent. The following is another clause of the contract: "This contract may be terminated upon the service of notice by the company upon said agent for good cause in accordance herewith; otherwise shall continue in force for the term of five years from January 1, 1891," etc.

The agent was paid for services rendered and expenses during the years 1891 and 1892, but he claims

to have rendered services during the years 1893, 1894 and 1895, for which he has not been paid except a credit by commissions in the sum of \$448.22, leaving a balance due of \$1,591.78, with interest.

The foregoing is a summary of the petition filed by defendant in error in the common pleas against the plaintiff in error. It contained an averment that the plaintiff had fully performed all things required of him by the contract, and prayed judgment for the amount due.

The insurance company, by answer, denied that plaintiff had kept the contract on his part to be performed; and, among other things, alleged that by the contract, this agent was to make monthly reports of business and remittances of collections, to the company which he had not done; that he had not operated in Holmes and Knox counties as required, and stated other particulars of default in duty of the plaintiff.

In reference to the guaranty of compensation, the insurance company asserted in the answer, that in a contract made in February, 1891, between the insurance company and W. E. Hoyer, a brother of the plaintiff, it employed said W. E. as its general agent, and that as a part of the consideration for said contract, the said W. E. Hoyer assumed to pay the plaintiff, Douglas F. Hoyer, and perform towards him the written guaranty sued on, and that he would save said company harmless on account of the same; and that having knowledge of this contract of assumption, the plaintiff assented to the same and thereafter looked solely to W. E. Hoyer, and never called upon the company for any settlement or payment until shortly before this action was commenced, March 23, 1899. The reply of plaintiff denied all

these averments of new matter. On these issues joined the jury found for the plaintiff and judgment was rendered on the verdict, which the circuit court affirmed.

The plaintiff in error relies for reversal of the lower courts, on the grounds that the trial court erred in charging the jury and in refusing to charge as requested. The terms of the charge are stated in the opinion.

Mr. T. E. Powell, for plaintiff in error.

Mr. Lemuel D. Lilly, for defendant in error, cited and commented upon the following authorities:

Ford v. Osborn, 45 Ohio St., 1; *Shahan v. Swan*, 48 Ohio St., 25; Sec. 5294, Rev. Stat.; *Hoffman v. Gordon*, 15 Ohio St., 211; *Insurance Co. v. Bonnell*, 35 Ohio St., 365; *Bennicke v. Insurance Co.*, 105 U. S. 355; 1 Ency. Law (2 ed.), 1220; *Smith v. White*, 5 Dana (Ky.), 376; *Robertson v. Clark*, 47 Miss., 208; *Sayre v. Wilson*, 86 Ala., 151; *Finley v. Whitely*, 46 Ohio St., 524.

PRICE, J. It is quite apparent from an examination of the record, that the contentions of the parties in the trial court centered on the issue tendered by the answer, that when the insurance company employed W. E. Hoyer, a brother of plaintiff below, as its general agent at Columbus, it was a part of the contract of employment, that W. E. Hoyer assumed to discharge all the obligations of the company to Douglas F. Hoyer, and save it harmless from the guaranty sued on, and that the latter, having full knowledge of the contract of assumption by W. E., consented to, and adopted the same, and thereafter reported to this general agent, and looked to him for

payment for his services, and not to the insurance company. There was evidence before the jury which tended to support this issue, as tendered by the company.

The plaintiff below denied all knowledge of his brother's agreement to assume the guaranty and to discharge its obligations to him, and likewise denied that he ever assented to the substitution of his brother in the contract, or that he accepted or adopted the same. This being the character and importance of the controversy, it was the duty of the trial court to so instruct the jury, that it would have no trouble in applying the law to the evidence as to the effect of the facts, circumstances and the conduct of the plaintiff below, which were largely relied upon by the insurance company, to prove his knowledge and acceptance of the new contract so far as it related to him.

It is not doubted as a question of law, that if the plaintiff did have such knowledge and assented to the substitution of W. E. Hoyer as the guarantor in the place of the insurance company, and accepted him as paymaster for services thereafter to be rendered, there was thus established a novation of contract which would release the insurance company from all further liability to him for such services. This novation of contract might be brought about by the substitution of a new debtor in place of the old one with intent to release the latter. And it is not essential that the assent to and acceptance of the terms of novation be shown in express words to that effect, but the same may be established by sufficient attending facts, circumstances and subsequent course of conduct. The plaintiff, by parol, could have released the insurance company from its writ-

ten guaranty to him, and if the contract of novation between the company and W. E. Hoyer was made as alleged, it was competent for the plaintiff to accept by parol the provisions made therein for him.

Hence, the duty of the trial court to inform the jury of these elementary principles for their guidance, and it was a proper case in which to instruct the jury, not as to what weight they should attach to any fact or circumstances presented, but what fact, circumstances or course of conduct of the parties, as disclosed by the testimony, it was their duty to consider as bearing upon this part of the controversy. This duty, we believe, the court did not fully perform. On the prominent, if not the paramount issue we have been considering, the charge of the court is very scant. It has the virtue of brevity, but in this case, the brevity became a fault. The jury was told in the most general terms that the plaintiff held the affirmative to show that there was something due him from the defendant, and that if he satisfied them by a preponderance of the testimony that something was due him, they should so find, but if he failed to so satisfy them, the verdict should be for the defendant. This was followed by a statement, that, if the plaintiff satisfied the jury of the validity of the contract (a matter not in the case), and that something was due him, the sum due with interest thereon should be the verdict. The jury was next told to look to the services performed under the contract between the plaintiff and the insurance company, and that for services rendered he was entitled to \$60 per month, less any commissions on business done by him during that time. Further, the court said, that if this contract was in any way terminated by the plaintiff, he would not be entitled to recover

for any services rendered after that time; and, if it was terminated by the defendant, by notifying the plaintiff of that fact, he could not recover for services rendered after such notice. The court then added: "But to terminate it by notice, the company would have to give that notice to the plaintiff, would have to bring it to his attention, so that he had knowledge of the fact. It would not be sufficient on the part of the defendant to terminate the contract by notifying some of the other agents; for instance, W. E. Hoyer, the general agent here. If that was not communicated to the plaintiff in this case, he would not be bound by it."

This language is good law, so far as it goes, on one phase of the dispute between the parties, but it does not touch upon what seems to have been the vital question raised by the pleadings and the testimony, namely, the plaintiff's knowledge of the contract of novation, his acceptance of the terms of the same, and his conduct thereafter in performance of the services. This was a subject of serious dispute between the plaintiff and defendant. No mention was made of the doctrine of novation of contract.

At this stage of the charge counsel for the insurance company made the following request: "Mr. Powell: I would like to ask the court to charge this: If they find from the evidence that W. E. Hoyer, the general agent, in February, 1891, assumed the guaranty named in the written contract, of \$60 per month, and the plaintiff in this case learned of that fact, and accepted it, and acted upon it and waived his claim for commissions on that account, then he could not recover."

This request invited the attention of the court to the question of novation, and it should have met with

a suitable response. The court, however, said: "If there was a contract between the company and W. E. Hoyer, by which W. E. Hoyer assumed and agreed to pay the guaranty under the contract between D. F. Hoyer and the insurance company, and D. F. Hoyer was a party to that contract between W. E. Hoyer and the company of the assumption on the part of W. E. Hoyer; or, if the plaintiff agreed to that contract and agreed to accept W. E. Hoyer as guarantor under that contract, then he would have to look to W. E. Hoyer for it. But if the contract between W. E. Hoyer and the company of assumption on the part of W. E. Hoyer of the guaranty in the contract between D. F. Hoyer and the company was simply between W. E. Hoyer and the company without the knowledge or consent of D. F. Hoyer, then it would have no effect on him, and would simply be a contract between W. E. Hoyer and the insurance company, and would not bind the plaintiff in this case. In other words, it would not bind him unless he was a party to it, or agreed to accept under it."

It will be seen that the jury was not told what the effect on the case would be, if the plaintiff had had knowledge of the new contract and consented thereto, but it was made prominent throughout the not very lucid paragraph, that the contract between W. E. Hoyer and the insurance company would not bind the plaintiff unless he was a party to it, or, *agreed* to accept under it; and the jury might well understand the court to mean, that if the plaintiff was not a party to the novation contract, he was not bound by it unless by express words he agreed to accept under it.

There was no room left for the jury to imply such an agreement from all the attending facts and cir-

cumstances, and the conduct of the plaintiff's business thereafter.

The charge falls far short of what was asked by counsel for the insurance company, and the instruction solicited is not, in either form or substance, found in any part of the charge, and for this reason the case was not properly and fairly submitted to the jury.

For error in the charge and for not charging as requested, the judgments of the circuit and common pleas are reversed, and cause is remanded.

Judgment reversed.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

FALCONER ET AL. v. MARTIN ET AL., AS ADMINISTRATOR, ETC.

Transcript, when to be filed—Section 6409, Rev. Stat.—Transcript of entries of probate court filed in common pleas to perfect appeal—May be amended under Section 5114, Rev. Stat.—Omitted entries may be supplied, when.

A transcript of the entries of the probate court, which is required by Sec. 6409, Revised Statutes, to be filed in the office of the clerk of the court of common pleas to perfect an appeal from the former court to the latter, if filed within the time prescribed by that section, may, under favor of section 5114, Revised Statutes, be amended by supplying omitted entries at any time before final judgment in the court of common pleas. *Johnson v. Johnson*, 31 Ohio St., 131, approved and followed. *Second National Bank of Bucyrus v. Moderwell*, 59 Ohio St., 221, modified by limiting the syllabus to the point decided.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Franklin county.

Between March, 1884, and April, 1894, the defendants in error filed in the probate court several ac-

66	252
168	648
168	678

counts as administrators of the estate of M. Louise Deshler, deceased. To these accounts the plaintiffs in error filed exceptions, which were overruled by the probate court February 6, 1897, and on that day the exceptors gave notice of their intention to appeal the cause to the court of common pleas, and the amount of the appeal bond was fixed by the probate court. On the 23d of February, 1897, an authenticated transcript of proceedings in the probate court, with original papers, was filed in the office of the clerk of the court of common pleas, the transcript so filed consisting of the single entry of the probate court relating to the overruling of the exceptions, the notice of appeal, and the fixing of the amount of the appeal bond by the probate court.

On the 17th of February, 1898, the administrators filed in the court of common pleas, their motion to dismiss the appeal upon several grounds, that which is now material being that the appellants had not filed in the office of the clerk of the common pleas court an authenticated transcript of the journal entries of the probate court by the second day of the term of the court of common pleas next after the notice or bond had been given in the probate court. After that day, by leave of the court of common pleas, a further authenticated transcript, showing all the proceedings in the probate court with reference to the estate, was filed in the office of the clerk of the court of common pleas, and the motion to dismiss the appeal was thereupon overruled. On a hearing of the exceptions to the account in the court of common pleas, they were overruled by that court. A bill of exceptions was taken by the exceptors, the plaintiffs in error, and a petition in error was by them filed

in the circuit court to reverse the rulings of the court of common pleas on the exceptions. Upon the hearing in the circuit court the following entry was made:

"Said parties appeared by their attorneys and this cause came on to be heard upon the petition in error of the said Henry C. Falconer and others, plaintiffs in error herein, together with the bill of exceptions, and the duly certified transcript of the orders and judgment of the court of common pleas of Franklin county, Ohio, and original papers, and was argued by counsel; upon consideration thereof the court finds that the common pleas court was without jurisdiction to hear, entertain or determine the alleged exceptions of the plaintiffs in error herein to the said accounts of the defendants in error herein and that therefore this court is without jurisdiction in the premises, and that said appeal from the judgment of said probate court should have been dismissed by the common pleas court on motion of the above named defendants in error. This court therefore now coming to render the judgment which the said common pleas court should have rendered, it is here considered, ordered and adjudged by this court that attempted appeal from the said probate court to the common pleas court be, and the same is hereby dismissed, and this petition and proceeding in error herein are hereby dismissed at the costs of the plaintiffs in error; that a special mandate be sent to the court of common pleas to carry this judgment and order for costs into execution, to all of which findings, orders, judgments and decrees the plaintiffs in error except."

A petition in error is filed here for the reversal of that judgment.

Messrs. Taylor & Taylor and Mr. T. E. Powell, for plaintiffs in error.

Messrs. Booth, Keating, Peters & Butler, for defendants in error.

SHAUCK, J. There appears to have been inadvertence in the preparation of the entry of judgment in the circuit court. If the court of common pleas enters a judgment or final order which it is without jurisdiction to make, the circuit court has authority to reverse it, and that authority was substantially exercised in the present case when the circuit court ordered the dismissal of the appeal in the court of common pleas, notwithstanding the conclusion stated that it was without jurisdiction because the court of common pleas had been.

The material proposition advanced by counsel for the plaintiffs in error is, that the circuit court erred in the conclusion that the court of common pleas did not acquire jurisdiction to hear and determine the exceptions to the account of the administrators because of a fatal defect in the steps taken to perfect their appeal to that court from the probate court. In the opinion of the circuit court and the briefs of counsel supporting its judgment, that defect is said to be in the failure of the appellants to file with the clerk of the court of common pleas a complete transcript of the docket or journal entries of the probate court "on or before the second day of the term of said court next after an undertaking or notice is given," that being the time fixed by section 6409 of the Revised Statutes, for such filing. This conclusion necessarily

implies both that the authenticated transcript consisting of the entry from the journal of the probate court overruling the exceptions, which was filed before the day specified, was not a sufficient transcript, and that it was not subject to effective amendment after that time. Without so deciding we assume that the authenticated transcript filed within the time, but containing the single entry showing the action of the probate court upon the exceptions, was not sufficient to bring that subject within the appellate jurisdiction of the court of common pleas. The question then is, whether such partial transcript duly authenticated and filed within the time required by the statute, may be effectively amended by filing a duly authenticated transcript of the remaining entries after that time. An affirmative answer to this question appears in every case where upon suggestion of the diminution of the record in an appellate court that court has ordered the filing of a complete transcript. Whether this incident of appellate jurisdiction is conferred or preserved by section 5114 of the Revised Statutes regulating amendments, its existence is made apparent by numerous constructions of that section and by familiar practice since its enactment. It was originally enacted as section 137 of the Code of Civil Procedure. It is not necessary to resort to inference from the variety of amendments which it has been held to authorize since in *Johnson v. Johnson, Executor*, 31 Ohio St., 131, it was held to authorize the amendment of proceedings for an appeal from the probate court to the court of common pleas on exceptions to the account of an executor.

The opinion of the circuit court in the present case shows that its conclusion was much influenced by the first section of the syllabus in *Bank v. Modericell*,

59 Ohio St., 221. It is true that the subject of that section was a proceeding in error in this court and particularly the requirement of section 6716 of the Revised Statutes, that in lieu of a transcript of the final record there may be filed in this court with the petition in error "a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of." But the difference does not appear to be important with reference to the present question, since both sections require a transcript of the docket and journal entries. Furthermore, it is true alike of appeals and proceedings in error that, being statutory, they are to be taken substantially according to the statutes by which they are authorized. The similarity of the proceedings in this respect results, necessarily, from the provisions of the constitution, the fourth section of the fourth article giving to the court of common pleas only such jurisdiction as may be fixed by law, and the second and sixth sections of the same article making a like provision with respect to the appellate jurisdiction of this court and the circuit court. With respect to the question before us the proceedings by which resort is had to a court of superior jurisdiction are appellate whether by a petition in error for the reversal of the judgment of the inferior court for error appearing upon its record, or by appeal with a view to a trial *de novo*. But though such proceedings are statutory it does not follow that the statutes by which they are authorized should be construed in a spirit of hostility, for they are, in the most obvious sense, remedial. In the *Bank v. Moderwell et al.*, there were two motions: One by the defendant in error to dismiss the

petition in error for want of a sufficient transcript of the record to be reviewed; the other by the plaintiff in error for leave to amend the certificate of the clerk authenticating the transcript which had been filed within the time prescribed, the only defect in the transcript being in the certificate of authentication. Obviously the granting of the latter motion would supersede the consideration of the former, and the latter motion was granted. The only point, therefore, that was decided in the case was that under the provisions of section 5114 of the Revised Statutes, the transcript was subject to amendment with respect to the defective certificate. The correctness of that conclusion does not appear to be doubted, nor are we aware of any reason for doubt respecting it. Since the preparation and authentication of transcripts are duties imposed upon the probate judge and the clerk of the court of common pleas, no reason appears for applying different rules to different parts of the transcripts which they prepare in the discharge of their official duties, and the reasons assigned for the conclusion reached in the case might well be considered as applying to other portions of the transcript. The case did not require any limitation to the meaning of section 6731, Revised Statutes:

“Writs of error and *certiorari* to reverse, vacate, or modify judgments or final orders in civil cases are abolished; but courts shall have the same power to compel transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, completed, or perfected, as they heretofore had under writs of error and *certiorari*.”

Nor was it intended to disapprove the following cases, or any of them: *Doty v. Rigour*, 9 Ohio St., 519; *Johnson v. Johnson*, 31 Ohio St., 131; *Godfred v. Godfred*, 30 Ohio St., 53.

The consideration of the case did not lead to any doubt respecting the proposition of the syllabus in *Doty v. Rigour*, *supra*, "that amendments may be made at any time before a suggestion of diminution of record would be too late; that is, at any time before final adjudication on error."

In cause number 6396 on the docket of this court, *Brigel v. Kittredge*, 65 Ohio St., 576, a motion was made by the plaintiffs in error, after the time limited for the filing of a petition in error, for leave to amend the transcript filed here by supplying an additional entry from the record of the court below, and also filing here a motion for a new trial, which had been filed there. The motion was resisted upon the authority of the *Bank v. Moderwell*, *supra*. It was, on the 26th of September, 1901, unanimously sustained by this court with respect to the additional entry, though overruled otherwise.

Being aware that the report of that case has occasioned embarrassment, not only in the case now under review, but in others, we have thought it advisable to repeat "our endeavor to state in the syllabus the points of law arising upon the facts of that case" by limiting it to the proposition decided: A petition in error with an authenticated transcript of the docket and journal entries having been filed in this court with a petition in error and with the necessary original papers within the time limited by statute, a material defect in the certificate of authentication may, under favor of section 5114 of the Re-

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vised Statutes, be corrected by amendment after that time.

Judgment of the circuit court reversed and cause remanded for the consideration of the errors assigned in the petition in that court.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

TAYLOR v. THE STANDARD BRICK COMPANY AND THE
AKRON HYDRAULIC PRESS BRICK
COMPANY ET AL.

Consolidation of actions—To avoid multiplicity of suits—Court may demand single action of several parties, when—Several actions against same defendant—Defendant may ask for consolidation of suits and for injunction—Order for such consolidation not a final order—Refusal of temporary injunction, not prejudicial error, when—Court procedure.

1. Under the Ohio code of civil procedure, as formerly in chancery, to avoid multiplicity of actions, the court may require that the rights of all parties interested in a transaction, or subject-matter, shall be determined in a single action; and in doing so the identity of parties is not considered, but rather a community of interest in the subject-matter of the litigation.
2. Where several actions for the recovery of money are pending against the same defendant and he answers in all of them setting up equitable defenses and praying for equitable relief, and after the issues are all made up in these cases, the defendant files his petition in the same court making defendants thereto all of the plaintiffs in said actions and all other persons whom he has reason to believe claim any interest in the subject matter of the controversy, and praying for the same relief as in his answers in such actions, and in case of recovery for marshalling of liens and other relief, and for a temporary injunction restraining the trial of said pending actions until the final hearing of his petition, it is not error to refuse the injunction and order that his actions for equitable relief shall be consolidated with the actions pending against him; nor is such order for consolidation a final order.

3. In such case the refusal to grant a temporary injunction as prayed is not prejudicial error, because the order consolidating all the cases practically effects the purpose sought to be accomplished by the injunction.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

This case was heard by one division of the Supreme Court.

The defendant in error, The Standard Brick Company, filed a petition against the plaintiff in error in the court of common pleas of Cuyahoga county to recover upon a bond which the plaintiff in error had signed as surety for one Joseph Soss, who had contracted to construct a building and pay all claims for labor and material, the bond containing a clause that the same should be for the use and benefit of any laborer or material man, the same as for the owner of the building. Afterwards the Akron Hydraulic Press Brick Company commenced a similar action against the plaintiff in error and a number of other suits were also begun against him on this bond. The plaintiff in error answered in those cases, setting up as a first defense a general denial, and alleging mistake in the execution of the bond in that the clause for the benefit of the laborers and material men was inserted by the scrivener by mistake and alleging fraud and misrepresentation in obtaining the bond. Some time after the issues had been made up in these suits the plaintiff in error commenced his action in the same court against the Standard Brick Company and all the plaintiffs in these various suits on the bond, and making defendant also all persons whom he had reason to believe had claims against him on account of the bond, and setting up in his petition the same allegations of mistake in the execution of the bond and fraud and misrepresentation in obtaining it. He also alleges the pendency of

these actions, that they are being pressed for trial and prays as follows: "Wherefore plaintiff invokes hereby the equitable jurisdiction of this court in the premises, and prays that a temporary injunction may be granted against said defendant, The Standard Brick Company, to enjoin and prevent the trial of said cause now pending upon the calendar, and ordering and requiring said defendant and the Akron Hydraulic Press Brick Company, The Portage Entry Quarries Company, The Malone Stone Company and Heintel & Kohl to dismiss their several pending actions at law against the plaintiff, and come into this cause where equitable jurisdiction may be had. That all of said defendants may be ordered to come into this cause and set out their several claims or be forever barred from commencing or maintaining any action against plaintiff. That each and all of the defendants herein may be enjoined from further prosecution of any actions brought by them and from commencing any action against this plaintiff upon said bond until the final determination of this action," etc. After the filing of this petition plaintiff filed a motion for a temporary injunction pending said action, and during the hearing of that motion, on the suggestion of the court, counsel for the Standard Brick Company, defendant, filed a motion to consolidate the action with the action of the Hydraulic Press Brick Company against the plaintiff in error. And thereupon the court overruled the plaintiff's motion for an injunction and ordered these actions consolidated with the case of the Hydraulic Press Brick Company, and this was assigned for error in the circuit court which affirmed the judgment of the common pleas, and that order and judgment is now complained of in this court.

Mr. J. W. Taylor and Mr. T. H. Garry, for plaintiff in error, cited and commented upon the following authorities:

Section 6707, Rev. Stat.; *People v. Railway Co.*, 29 N. Y., 418p; Tidd's Prac., 4th Am. ed., 614; 4 Ency. Pl. & Prac., 677; Sec. 5120, Rev. Stat.; *Burkhardt v. Burkhardt*, 36 Ohio St., 261; *Goslin v. Campbell*, 7 Re., 456; 3 Bull., 369; Sec. 817, Code of Civil Pro.; *Mayor v. Coffin*, 90 N. Y., 312; *Grocery Co. v. Flint*, 5 N. Y. App. Div. Sup. Court, 263; *Wooster v. Case*, 12 N. Y. Supp., 769 (34 N. Y., 577); Sec. 5707, Sandel & Hill's Digest; *Meehan v. Watson*, 65 Ark., 216; *Smith v. Smith*, 22 Colo., 480; *Ortman v. Railway Co.*, 32 Kan., 419; Code of Iowa, Sec., 2734; *Harwick v. Weddington*, 73 Ia., 300; *Bank v. Ingerson*, 105 Ia., 349; Sec. 2792, Revised Statutes of Wisconsin; *Winninghoff v. Wittig*, 64 Wis., 180; *Livermore v. Bainbridge*, 56 N. Y., 72; *Bank v. Commonwealth Nat. Bank*, 2 Hun, 287; *Brown v. Kuhn*, 40 Ohio St., 468; Story's Eq. Jur. (13 ed.), Secs. 875, 885, 901, 904; Beach Modern Eq. Jur., Sec. 647; High on Injunctions, Sec. 63; *Becker v. Church*, 115 N. Y., 562 (*Penn. v. Ingles*, 82 Va., 65); *Zeigler v. Beasley*, 44 Ga., 56; *Railroad Co. v. Mayor*, 54 N. Y., 159; *Railway Co. v. Ramsey*, 45 N. Y., 637; *Burke v. Railway Co.*, 45 Ohio St., 631; *Railway Co. v. Hamilton*, 2 Circ. Dec., 259; 3 C. C. R., 455; *Watson v. Sullivan*, 5 Ohio St., 43; *Turpin v. Coates*, 12 Neb., 321; Secs. 5071, 5074 and 5009, Rev. Stat.; *Wilkins v. Bank*, 31 Ohio St., 565; *Railroad Co. v. Sloan*, 31 Ohio St., 1.

Messrs. Solders, Hogsett & Tilden and Messrs. Henderson & Quail, for defendants in error, cited and commented upon the following authorities:

Missionary Society v. Ely, 56 Ohio St., 405; *Watson v. Sullivan*, 5 Ohio St., 43; *Railroad Co. v. Sloan*,

31 Ohio St., 1; *Railroad Co. v. Duckworth*, 1 C. D., 618; 2 C. C. R., 518; *Burke v. Railway Co.*, 45 Ohio St., 631; *Burkhardt v. Burkhardt*, 36 Ohio St., 261; Sec. 5120, Rev. Stat.; *Massie v. Stradford*, 17 Ohio St., 596; *Buckner v. Mear*, 26 Ohio St., 514; *Sheeful v. Murty*, 30 Ohio St., 50.

DAVIS, J. The plaintiff in error complains that there was error in the judgment of the circuit court affirming the judgment of the common pleas in making the order of consolidation, and in refusing a temporary injunction, on motion, as prayed for in his petition.

I. It is a familiar principle of equity practice, which we conceive is not abrogated by the code, that in order to avoid multiplicity of actions the court may require the determination of the rights of all parties interested in a transaction or subject-matter, in a single action, wherever the purpose of justice may seem to demand it; and in doing so the identity of parties is not considered, but rather a community of interest in the subject-matter in litigation. Pomeroy Eq. Jur. (2nd ed.), Secs. 268, 269; 4 Enc. Pl. and Prac. 690, 692; 2 Daniel's Ch. Prac. (6th ed.), 1120, note *a*. The authors of our code, who used the New York code of civil procedure as a model, seem to have deliberately rejected the provision in the latter code that "where two or more actions in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, *in its discretion*, by order, consolidate any or all of them into one action." Our statute, Revised Statutes, Sec. 5120, is mandatory that on motion of a defendant the several actions shall be consolidated, if it appear that the actions,

not causes of action, could have been joined and ought to be joined. The power of consolidation is not limited to identity of parties and to causes of action which might be joined in the same petition under the rules of pleading; but it seems to have been purposely broadened so as to authorize the consolidation of all actions which might be joined, either at law or in equity, for convenience of trial, for preventing multiplicity of actions or for the purpose of saving costs. This plaintiff in error was defendant in a number of actions upon his bond, and in all of them he answered, as one defense, that the scrivener had made a mistake in drafting the bond, and as another defense, that the bond was obtained by fraud and misrepresentation. Some time after the issues were made up in these cases, the plaintiff in error filed his petition in this case, making as defendants thereto all of the plaintiffs in these actions on the bond, as well as all other persons whom he had reason to believe asserted claims against him on the bond. He sets forth in his petition the same allegations of mistake and fraud which he had made in his answers. He invokes the equitable jurisdiction of the court in the premises, prays that a temporary injunction may be granted against the Standard Brick Company to prevent the trial of its cause against him, and requiring the Standard Brick Company, the Akron Hydraulic Press Brick Company, and others, to dismiss their several actions at law, pending against the plaintiff, and to come into this cause where equitable jurisdiction may be had, etc. Thus the plaintiff himself sought to bring all the pending actions, and all the parties concerned, into one action; and he cannot be allowed to complain when the defendants, by a motion to consolidate, concur with

him. We find no error in the order of consolidation; and even if it were erroneous, it is not reviewable now, because it did not determine any of the actions or prevent a judgment therein. Section 6707, Rev. Stat.

It is suggested in argument by plaintiff in error that the order of consolidation made no provision as to the pleadings that have been filed, and that the order of proceeding in the trial of the consolidated action may prejudice the plaintiff in error. We see no difficulty in this. The issues are not changed by the consolidation. The equity questions raised by the plaintiff in error in his petition and cross-petitions below will be first disposed of, and next the other issues, if they remain after the determination of the equity issues. *Massie v. Stradford*, 17 Ohio St., 596; *Dodsworth v. Hopple*, 33 Ohio St., 16; and see also, *Reiff v. Mulholland*, 65 Ohio St., 178.

II. It is also maintained by the plaintiff in error that the order refusing a temporary injunction was an order adversely affecting his substantial rights, that it is an order made in a special proceeding, and that it is therefore a final order which may be reviewed on error, and which ought to be reversed. For the purposes of this case it may be conceded that the order refusing the injunction is a final order; for it seems to be clear that it is not prejudicial to the plaintiff in error, and therefore it does not authorize a reversal, even if it were technically erroneous. It appears from the plaintiff's petition that the purpose which was sought to be accomplished by the temporary injunction, was to stay the trial of the several pending actions until this action had been heard and determined. The consolidation of all of

these actions with this one, effectuated this purpose, because judgments on the bond cannot be rendered against the plaintiff in error until the equitable issues are determined.

The judgment of the circuit court is therefore

Affirmed.

BURKET, SHACK and PRICE, JJ., concur.

THE FARMERS' BANK ET AL. v. THE DIEBOLD SAFE &
LOCK CO. ET AL.

Certificate of stock not a negotiable instrument, when—Certificate issued to secretary of company—By him assigned and delivered to bona fide holder—But not transferred on books of company—Fraudulently reobtained and delivered to third party—First assignee held the real owner.

1. A certificate of stock of a corporation expressed on its face to be transferable only on the books of the company at its office, personally, or by attorney, on surrender of this certificate, and transferred in blank upon its back, is not a negotiable instrument.
2. Where such a certificate of stock is issued to the secretary of the company, the stock standing in his name upon the books, and such holder assigns the same to a bona fide taker thereof, by executing an assignment on the back blank as to the name of the assignee, and delivers the certificate so assigned to such assignee, and then afterwards fraudulently obtains possession of such certificate by abstracting it from the president's drawer in the safe of the company, where it had been placed by the president, and pledges it to another for his own debt, and the creditor accepts such pledge without inquiry, or attempt to have the stock transferred to him on the books, such first assignee will, in the absence of culpable negligence on his part proximately contributing to the deceit, be held to be the real owner of the certificate, although such second pledgee has acted in good faith and on the belief that his debtor was the real owner of the stock.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Stark county.

The present action is to reverse the judgment of the circuit court of Stark, where the cause was tried on appeal from the common pleas of that county. The record is voluminous and somewhat involved, but the statement following will be found sufficient to an understanding of the points considered :

The controversy in this court concerns the ownership of certificate of stock No. 61, of the defendant in error, The Diebold Safe & Lock Company, an Ohio corporation with its principal office and place of business at the city of Canton, and of which William W. Clark was president and Dominick Tyler, secretary and treasurer. From the finding of facts made by the circuit court it is shown that on the 30th of April, 1881, the Company issued and delivered to Tyler its certificate of stock of the above number, signed by Clark as president and Tyler as secretary, and having the seal of the corporation legally affixed thereto, calling for fifty shares of stock therein, of one hundred dollars per share, which certificate at the time of its issue was legal, valid and regular in all respects. Tyler had been secretary and treasurer of the Company since 1876, and Clark had been its president during that time. The certificate was in words and figures as follows :

“State of Ohio. Diebold Safe & Lock Co., No. 61, 50 shares. This is to certify that Dominick Tyler is entitled to fifty shares of the capital stock of the Diebold Safe & Lock Company, of Canton, Ohio, transferable only on the books of said company at their offices at Canton, Ohio, personally, or by attorney, on the surrender of this certificate. In witness whereof, said company has caused this certificate to be signed

by its president and secretary, and sealed with its corporate seal. Canton, O., April 30th, 1881.

“W. W. CLARK, President.

“D. TYLER, Secretary. (Seal.)”

Between the years 1882 and 1884, Tyler became indebted to the Company by reason of overdrafts, and on August 20, 1884, on demand of Clark, for the purpose of securing the corporation on the indebtedness, which amounted to about \$4,000, signed the following endorsement on the back of the certificate and delivered it to the corporation for the purpose of securing the debt then owing:

“For value received * * * do hereby sell and assign this certificate to * * * and authorize the stock represented therein to be transferred on the books of this company.

“D. TYLER.”

The certificate was then handed to Clark as president, who placed it in an unsealed envelope in an unlocked drawer in the safe of the Company which was situated in the office occupied by Clark as president and Tyler as secretary and treasurer, and which safe was used by them every day for the purpose of keeping papers of the corporation, and was accessible to Clark and Tyler, the drawer being used by Clark as president in which to keep the papers of the Company over which he as such president had individual and personal control, and in which Tyler as secretary each month put a check for the salary of said Clark. At this time there was marked on the stub of certificate No. 61, of the stock book, the following language: “8-20-'84. Left with the Company as collateral security.”

On June 1, 1891, Tyler not having paid his indebtedness to the corporation for which the stock had been pledged as security, Clark agreed to purchase certificate No. 61 from Tyler, and after all arrangements had been made between them for the purchase, Clark went to the drawer of the safe to get the certificate, but did not find it, whereupon he made inquiries concerning its whereabouts of Tyler and of others, but they all disclaimed having seen the certificate, and not finding it in the safe, a new certificate No. 140, was, on June 1, 1891, issued therefor and delivered to Tyler and by him assigned to Clark, whereupon Tyler paid all his indebtedness to the Company from the money received from Clark on said purchase. And Clark kept certificate No. 140 until the 23rd day of June, 1892, without having the same transferred on the books of the Company, at which last date Clark surrendered certificate No. 140 and had certificate No. 151, for fifty shares of stock, issued directly to him; and Clark made no search or inquiry for certificate No. 61 after the issuance of certificate No. 140 until September 29, 1896.

On June 1, 1891, when certificate No. 140 was issued, there was marked, in red ink, on the stub of the stock book from which certificate No. 61 had been issued the words: "Certificate lost and duplicate issued under No. 140, June 1, 1891." But certificate No. 61 never had anything written upon it which would indicate that the same had been surrendered or canceled, although on June 1, 1891, it was intended and thought by the corporation and by Clark that certificate No. 61 had been canceled and surrendered, and it was then treated and considered by the Company and Tyler as canceled and surrendered. It has been and was the custom of the Company and

of Clark, when any certificate of stock of the Company was canceled or surrendered, to attach such canceled or surrendered certificate to the stub of the stock certificate book from which it had been taken.

It is distinctly found as matter of fact, by the circuit court, that certificate No. 61 was lost or mislaid without any fault or negligence on the part of Clark or of the Company, and it is further found that Clark became, by his purchase of said stock, and always thereafter continued to be, the actual owner thereof.

From one to two years after June 1, 1891, Tyler, who was still the acting secretary of the Company, found said certificate No. 61 in an old envelope in the said drawer of the safe under other papers, where it had been placed by Clark, and after so finding it, Tyler, without the knowledge or consent of Clark or of the Company, on April 29, 1895, took the certificate and delivered it in the same condition as it was at the time of its delivery to Clark, as president, to the Farmers' Bank, which having no knowledge as to how Tyler obtained the same, accepted it as collateral security for the sum of \$2,500 then loaned by the bank to Tyler, personally, in which transaction neither the Company nor Clark had any interest, nor had either any knowledge concerning the same. Tyler was not the agent of the Company or of Clark in anything respecting said loan to him by the bank or respecting his possession of the certificate, or of his hypothecation of the same as security. Afterward Tyler pledged the same certificate to Adam C. McDowell, one of the plaintiffs in error, under like circumstances, for a debt due from Tyler to him.

Messrs. McCarty, Craine & McDowell and *Mr. A. A. Thayer*, for plaintiffs in error, cited and commented upon the following authorities:

Railway Co. v. Bank, 56 Ohio St., 351; *Knox v. Eden Musee American Co.*, 148 N. Y., 441; *Jarvis v. Manhattan Beach Co.*, 148 N. Y., 652; *Bank v. Railway Co.*, 21 Ohio St., 221; Cook on Stockholders, Secs. 415, 416; *Railroad Co. v. Schuyler*, 34 N. Y., 30; *Titus v. Turnpike Co.*, 61 N. Y., 237; *Bank v. Railroad Co.*, 137 N. Y., 231; *Tome v. Railroad Co.*, 39 Md., 36.

Messrs. Clark, Ambler & Clark, for defendants in error, cited and commented upon the following authorities:

Eaton v. Davidson, 46 Ohio St., 355; *Grever & Sons v. Taylor*, 53 Ohio St., 631; *Bank v. Wallace*, 45 Ohio St., 152; *Brownell v. Harsh*, 29 Ohio St., 631; *Holzworth v. Koch*, 26 Ohio St., 33; *Robinson v. Boyd*, 60 Ohio St., 57; *Dalrymple v. Wyker*, 60 Ohio St., 108; Sec. 3255, Rev. Stat.; *Railway Co. v. Bank*, 56 Ohio St., 351; *Knox v. Eden Musee American Co.*, 148 N. Y., 441; *Moore v. Bank*, 111 U. S., 156; *Farrington v. Railroad Co.*, 150 Mass., 406; *Insurance Co. v. Railroad Co.*, 139 N. Y., 146; *Tome v. Railroad Co.*, 39 Md., 36; *Hill v. Publishing Co.*, 154 Mass., 172; 1 Cook on Corp. (4 ed.), 359; *Barstow v. Mining Co.*, 64 Cal., 388; *Anderson v. Nicholas*, 28 N. Y., 600; *Land Co. v. Dennis*, 85 Ala., 565; *Sicim v. Wilson*, 90 Cal., 126; *O'Herron v. Gray*, 168 Mass., 573; *Board of Education v. Sinton*, 41 Ohio St., 504; *Kimball v. Billings*, 55 Me., 147; *Hildyard v. South Sea Co.*, 2 P. Wms., 76; *Simm v. Telegraph Co.*, 5 Q. B. D., 188; 2 Beach Modern Law of Contracts, Sec. 1952; 1 Cook on Corp., Sec. 293; *Jarvis v. Manhattan Beach Co.*, 148 N. Y., 652.

SPEAR, J. The demand of the plaintiffs in error is, in substance, that the Company and Clark be held not to have title in certificate No. 61, and that title

in the same be declared to be in them, and for full equitable relief.

It is manifest that if this relief be granted, the claims of the Company and of Clark must be denied them on the ground either—

1. On the doctrine of implied agency; or,
2. On the application of the principles of estoppel.

But Tyler, although secretary and treasurer of the Company, was not its agent to represent to one with whom he might be dealing on his own account, and away from its office, the fact as to who owned the stock of the corporation, or in whose name the stock stood on its books. Such representations were no part of his real or apparent authority. The transaction with the bank was one which did not concern his official duty in any respect, but was wholly for his own personal profit. The Company had no actual or apparent connection with it, nor did Tyler pretend to represent or act for the Company. Indeed it was apparent from the face of the certificate, that Tyler had exercised his authority as secretary for his own advantage. In other words, the case stands as to the question of agency, precisely as though the transfer had been made by one who had no relation whatever with the management of the Company, for it is of no materiality that Tyler was the agent of the Company for some purposes so long as he was not its agent for the purpose of negotiating its certificates of stock as security for his individual debts, and so long as he did not pretend to have such authority, nor to act for the Company in any way.

True, the statute gives authority to the president and secretary, on demand, to execute and deliver to a stockholder a certificate showing the amount of stock owned by him, but it does not follow from this

provision that the secretary could have authority, express or implied, to take possession of a certificate once owned by him, but which had been legally and formally transferred and manually delivered to the Company, and thus passed wholly out of his own possession, and later sold outright to a third party, and issue it anew. His act in abstracting the certificate from the safe, and uttering it as valid, had no relation to the authority with which he was actually clothed, nor in fact with any semblance of authority. It was, in fact, a criminal act, perpetrated for private gain and not connected with any official authority, real or apparent. At all times, after the transfer to the Company, the certificate was in the legal as well as manual possession of the Company until the purchase by Clark, and then and thereafter it was in his legal possession, and in his actual possession until abstracted by Tyler. Tyler's access to the drawer where the certificate had been placed by Clark, and opportunity to possess himself of any of its contents was not, therefore by reason of any authority. His opportunity was that of a mere servant. The doctrine of implied agency would not seem to be applicable to the facts of this case.

Is the Company, or is Clark, estopped to make defense and set up title to the stock?

The ground urged by the plaintiff in error is that of culpable negligence. The finding of the trial court that certificate No. 61 was lost or mislaid without any fault or negligence on the part of Clark or of the Company, answers this claim of estoppel unless the law is that one may not leave his property where it may be found by a servant except at the peril of losing his title thereto if the servant steals and disposes of it to another. We know of no principle of law, nor of

any decision, which goes to this length. The facts do not make a case where the owner of property has put it in the possession of another with *indicia* of ownership so as to invoke the rule that where two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss must sustain it. The Company, when it became the equitable owner of the stock, placed the certificate in the drawer of its president; it did not place it in the possession, real or constructive, of Tyler. Nor was there any reason existing for suspecting the integrity of Tyler. He had been an officer of the Company, trusted, and apparently deserving trust, since the year 1876. Nothing had occurred during all this time to cause the Company, or his fellow officers, to doubt his honesty and faithfulness, and so far as appears, the abstracting and using this surrendered certificate was his first act of malversation during his employment. If the Company had had reason to suspect the honesty of Tyler, a different question would be presented. It is not negligence, but ordinary care and prudence, to deal with one who has proven himself worthy of confidence in the belief that he remains honest, and trust him accordingly, even though it should turn out that he afterwards, yielding to temptation, has betrayed his trust. As remarked by Williams, J., in *Ex parte Swan*, 7 C. B. (N. S.), 447; "It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might foresee and dread, and therefore shun. But it is another and very different proposition to maintain, that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause." The injury to the Bank and to Mc-

Dowell was not the natural consequence of the leaving of the certificate in the president's drawer, or one which might have been reasonably anticipated. The rule, and we believe the true rule, is stated by Blackburn, J., in *Swan v. N. B. A. Co.*, 2 H. & C., 182, thus: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

It is urged that the Company ought, before issuing a new certificate to Clark, to have required a bond of indemnity from Tyler. But No. 61 was not a lost or destroyed certificate within the meaning of the statute; nor was it outstanding. It was in the possession and custody of the Company; for the time mislaid, but still in its control. Tyler had already done respecting it all that he was to do, or could then have been required to do.

It is further insisted that, on the authority of *Bank v. Railway Co.*, 21 Ohio St., 221, Clark having but an equitable title to the stock, cannot prevail against the Bank's legal title. But this proposition assumes the very point in controversy, and the trouble with it is that the Bank got no title. It took its pledge from one who did not own the property; in other words, from a thief.

A review of the authorities we regard as unnecessary and content ourselves with the citation of the following cases: *Moore v. Bank*, 111 U. S. 156; *Far-*

rington v. Railroad Co., 150 Mass., 406; *Insurance Co. v. Railroad Co.*, 139 N. Y., 146; *Hill v. Jewett Pub. Co.*, 154 Mass., 172; *Knox v. Eden Musee Co.*, 148 N. Y., 441; 1 Cook on Corp., Sec. 359; *Barstow v. Savage Mining Co.*, 64 Cal., 388; *Birmingham Land Co. v. Dennis*, 85 Ala., 565; *Swim v. Wilson*, 90 Cal., 126; *O'Herron v. Gray*, 168 Mass., 573; *Shaw v. Spencer*, 100 Mass., 382.

Much stress is laid by counsel for plaintiffs in error upon the case of *Railway Co. v. Bank*, 56 Ohio St., 351, and it is insisted that the case at bar is ruled in their favor by that case. We think not. That was a case of over issue by an officer having apparent authority to issue. This is a case of a stolen certificate. The substance of the holding in the case cited is, as expressed in the third paragraph of the syllabus, that the company is charged with the duty of observing care in the issue of stock, and of supervising their agents charged with the performance of the duty, and the want of care found against the corporation was that it negligently permitted its secretary to have possession of certificates of stock, signed by its president and having thereon the corporate seal, in excess of its authorized capital, and thus afforded that officer the opportunity of fraudulently issuing certificates of stock. It is apparent that this case presents a radical distinction when placed in contrast with the case at bar. There the negligence of the company was an essential feature; here it is distinctly found that the Company was not negligent. Whether the language of the opinion and syllabus, in all particulars, is or not of too broad a character we need not discuss. Suffice to say that the law of the case is the judgment of the court upon the facts found, and that, and that alone, is what is binding as a precedent.

The essential facts being different, the case does not apply.

The case at bar may be summed up in a paragraph. The secretary of the corporation was a holder of its stock represented by a valid certificate. He pledged the stock to the Company as security for a debt owing to it, and assigned the certificate in blank and delivered it so assigned to the Company. It was then placed by the president in his drawer in the Company's safe. Later the secretary, by private agreement with the president, sold the certificate to him outright. Without fault of the Company, or of the president, the certificate had become mislaid. Some time after, the secretary found and fraudulently abstracted the certificate from the drawer and pledged it for a private debt to an innocent taker who accepted the security without inquiry. This pledgee took no title.

The judgment of the circuit court will be

Affirmed.

WILLIAMS, C. J., BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

THE CITY OF DAYTON ET AL. v. BAUMAN.

66 379
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Power of assessment by cities—Section 6 of Article 13 of constitution—Limitation of same by Section 19 of Article 1—Inviolability of private property—Compensation for land appropriated for public use.

1. The limitation of Section 19 of Article 1 of the constitution on Section 6 of Article 13 as to assessments, goes to the full extent of prohibiting the raising of money directly or indirectly by assessment to pay compensation, damages or costs for lands appropriated by the public for public use. *Railway Co v. Cincinnati*, 62 Ohio St., 465, approved and followed.
2. Said limitation does not affect or prohibit the raising of money by assessment to pay for surface improvement of streets, sewers, etc., so long as the assessment does not exceed the special benefits conferred. *Walsh v. Barron*, 61 Ohio St., 15, approved and followed.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Montgomery county.

The city of Dayton appropriated by proper legal proceedings certain lands for the extension of two streets, Monroe and Long, and having paid the compensation, damages and costs, made an assessment upon the abutting, adjacent and contiguous lots for the purpose of raising money to reimburse its treasury for the money so paid out, or else to raise money to pay the bonds issued by the city by means of which it pledged the public faith and credit of the city and thereby raised money with which it paid said compensation, damages and costs. Which method was pursued does not clearly appear, but that the assessment was for the purpose of paying in some form said compensation, damages and costs is conceded.

None of the lots or lands of Mr. Bauman were appropriated, but an assessment was made on his lots

for the payment of compensation, damages and costs awarded to others whose lots had been appropriated for the extension of said streets.

He enjoined the city and proper officers from enforcing the assessments, and the circuit court having decided the case in his favor, the city came here on error, seeking to reverse the judgment below.

Mr. Edwin P. Matthews, city solicitor, *Mr. Charles J. Hunt* and *Mr. Albert H. Morrill*, corporation counsel, for plaintiff in error.

The presumptions are in favor of the assessments and it is to be presumed that all jurisdictional and other steps were taken, unless alleged in the petition to be otherwise. *Bolton v. Cleveland*, 35 Ohio St., 319; *Spangler v. Cleveland*, 43 Ohio St., 526.

It is provided that the city may specially assess the cost of opening streets. Sections 2263 and 2264, Rev. Stat.

Section 2264, Rev. Stat., as it existed at the time this assessment was made, authorized the council to determine in how many installments and at what time the assessments should be payable. 83 Ohio Laws, 171.

In the cases provided for in Sec. 2263, Rev. Stat., of which this is one, it is the duty of the clerk to certify assessments to the auditor to be placed upon the tax duplicate and collected as other taxes. Section 2265, Rev. Stat.

In all such cases, the city must do as it did in this case, viz., pay at least the one fiftieth of the cost. Section 2263, Rev. Stat.

Special assessments shall be payable by the owners of the property assessed, personally, by the time stipulated in the ordinance, and shall be a lien from the

date of the assessment upon the respective lots and lands assessed. Sections 2285 and 2297, Rev. Stat.

The city elected to place these assessments upon the tax duplicate for collection. After this is done, an action cannot then be brought for the collection of the assessment, but collection must be made by the treasurer. *Fremont v. Hayes*, 7 Dec., 263; 4 N. P., 379.

The amended petition does not allege that the plaintiff below was prejudiced by the action of the city clerk and does not allege facts to show that he was, and it is to be presumed that he was not. *Slavin v. Greene*, 4 Dec., 99; 2 N. P., 39.

The irregularity upon the part of the clerk, being merely in a formal matter, should be disregarded. Section 2327, Rev. Stat.

The assessing ordinances were passed on one reading. This was sufficient for they were neither of a permanent nor of a general nature. Section 1694, Rev. Stat. *Upington v. Oviatt*, 24 Ohio St., 232; *Cincinnati v. Bickett*, 26 Ohio St., 49; *Guernsey Co. (Comms.) v. Cambridge*, 3 Circ. Dec., 669; 7 C. C. R., 72.

The general assembly is required to restrict the power of municipalities as to taxation and assessments. Constitution, Art. 13, Sec. 6.

Both these powers are thus recognized.

In a general sense a tax is an assessment, and an assessment is a tax, but there is a well recognized distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in their immediate vicinity, and levied with reference to special benefits to the property assessed. *Lima v. Cemetery Assn.*, 42 Ohio St., 128.

The power to make assessments had been in constant use before the adoption of the constitution of 1851, and is now sanctioned by that instrument. *Raymond v. Cleveland*, 42 Ohio St., 522.

As the legislature is required to restrict the power of assessment, it follows that the power exists and that the legislature may provide for its exercise. *Hill v. Higdon*, 5 Ohio St., 243.

Municipalities may appropriate lands for streets. Section 2232, Rev. Stat.

When the corporation appropriates land for the purpose of opening and extending a street, the cost may be assessed upon the general tax list. Sections 2263, 2264, 2270, 2273, 2277, 2278, 2279 and 2280, Rev. Stat.

It is not alleged that the lots and lands benefited and to be assessed were not specifically designated before the improvements were made, nor that any requirement of the statute was omitted, and the presumption is that all of the provisions of the law were complied with. *Ward v. Barrows*, 2 Ohio St., 241; *Coombs v. Lane*, 4 Ohio St., 112; *Reynolds v. Schweinfus*, 27 Ohio St., 311.

It has been repeatedly held in the Supreme Court of this state that special assessments may be made to pay the cost of land taken for street purposes. *Raymond v. Cleveland*, 42 Ohio St., 522; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Krumberg v. Cincinnati*, 29 Ohio St., 69; *Meissner v. Toledo*, 31 Ohio St., 387.

No part of the Bauman property having been taken, the question in the Norwood-Baker case and in the Cincinnati case in 62 Ohio State, does not arise here. In the Norwood-Baker case, the court says: "Undoubtedly, abutting owners may be subjected to

special assessments to meet the expenses of opening public highways in front of their property. Such assessments, according to well established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements." *Norwood v. Baker*, 12 O. F. D., 228; 172 U. S., 269.

In *Railway Company v. Cincinnati*, 62 Ohio St., 465, all that was considered was the application of Sec. 19, Art. 1 of the Ohio Constitution, to the state of facts therein presented.

Why these statements were necessary to the decision in that case is not apparent, and they do not contain what has always been regarded as the law in this state, and for that matter in the whole country. *Cooley on Taxation*, pp. 611, 612, 633.

Under Sections 2704 and 2705, of the Revised Statutes, municipalities may borrow money and issue bonds, in anticipation of the collection of special assessments, to pay for improvements, and this is what is universally done, not only in the matter of opening streets, but where street paving, sewer, and other public improvements are made, which are specially assessed.

The long line of decisions in this state upon which special assessments of the kind in question have been based, and which are in harmony with the decisions of other states and of the United States, should be upheld on the principal of *stare decisis* and ought not to be lightly overruled. *Schroder v. Overman*, 61 Ohio St., 1.

In the case at bar, the assessments were made according to benefits and no claim is made that Bauman's property was not benefited to the extent of the assessments, by the opening of the streets, but the

plain inference from the amended petition is that it was. No property or money was taken, or attempted to be taken, without due process of law. The provisions of the statutes were complied with, and it has been held by this court and by the Supreme Court of the United States that assessments made under such statutes as ours, when coupled with the right of the property owner to question in court such assessments as he claims are illegal, are made by due process of law. *Caldwell v. Carthage*, 49 Ohio St., 334; *Turnpike Co. v. Parks*, 50 Ohio St., 568; *French v. Paving Co.*, 181 U. S., 324; 45 Bull., 401; *Wight v. Davidson*, 181 U. S., 371; 45 Bull., 428; *Detroit v. Parker*, 181 U. S., 399; 45 Bull., 431.

A special taxing district, viz., of the property benefited, was made by the city under the provisions of the statute, and the assessment was laid according to benefits. This, the Supreme Court of the United States hold is constitutional and can be done. *Webster v. Fargo*, 181 U. S., 394; 46 Bull., 77.

Under the doctrine of the case in 62 Ohio State, the land for the pumping station, having been taken by the city, would have to be paid for by the city, and the cost could not be included in the amount assessed for the sewers. We do not believe this is the law—and the case might easily occur. In Dayton we have a pumping station in connection with the sanitary sewers, and if the city had not happened to own the land upon which it is located, we would have had to acquire same either by purchase or by condemnation, and the cost would most certainly have been included in the cost of the sewers, and would have been assessed.

The decision of the circuit court in this case is not in accord with the decisions of the Supreme

and circuit courts in the following cases: *Krumberg v. Cincinnati*, 29 Ohio St., 69; *Norwood v. Ogden*, 8 Circ. Dec., 383; 18 C. C. R., 869.

This case involves the constitutionality of Sec. 2264, Rev. Stat., and of other sections authorizing special assessments, and involves the construction of Sec. 19, Art. 1, and of Sec. 6, Art. 13 of the constitution of Ohio.

The present case does not come within the rule recently laid down by this court, that Sec. 19, Art. 1, of the constitution of Ohio, prohibits the benefits, resulting to a piece of property by reason of the opening of a street contiguous thereto, being considered in making an assessment to pay for such opening. For that rule was applied to a case in which *part* of a piece of property had been condemned and compensation awarded to the owner thereof, and the cost of such condemnation, including the amount awarded to the owner, assessed against the remaining property. In the present case no part of the property assessed has been taken, and hence the city of Dayton is not, by making such assessment, asking Bauman to pay back to it the amount which he has already received.

This principle, that the finding of the city council as to benefits conferred by a certain improvement is conclusive on all parties concerned, was laid down by this court in the case of *Chamberlain v. Cleveland*, 34 Ohio St., 551.

The same principle is laid down by Cooley in his work on *Taxation*, 2nd ed., at page 661; Elliott on *Roads and Streets* (2 ed.), at Sec. 556.

In the present case the land of the defendant in error was not distant, but contiguous to and abutting on the improvement for which it was assessed.

The same principle is laid down in the following cases: *Cruger, In matter of*, 84 N. Y., 619; *State v. District Court, Ramsey Co.*, 29 Minn., 62; *King v. Portland*, 2 Ore., 146.

Even the text writers and courts which hold that the state has no power to assess arbitrarily the cost of the improvement upon the abutting property, concur in declaring that they have the power to assess an amount equal to the benefits derived from the improvement, and that the exercise of such power in this manner is just and equitable. Dillon *Municipal Corporations*, at Secs. 752 and 761; Cooley on *Taxation*, 639; Elliott on *Roads and Streets* (2 ed.), Sec. 543; Mr. Hare on *American Constitutional Law*, pages 305 to 315.

By a review of the decisions we find that the courts in every jurisdiction have upheld this theory of assessments, and sustained those levied in accordance with it. So uniform and so decisive are the authorities on this subject, that it is scarcely necessary to do more than comment on a few of the leading decisions.

Their purpose of adhering to this doctrine was clearly expressed in the case of *Spencer v. Merchant*, 125 U. S., 345; and also in *Parsons v. District of Columbia*, 170 U. S., 45.

The intention of the Supreme Court to stand by its early decisions on assessments levied according to benefits has lately been expressed in the case of *Norwood v. Baker*, 12 O. F. D., 228; 172 U. S., 269.

This intention is still further shown by the recent case of *French v. Paving Co.*, 181 U. S., 324.

The highest tribunal of every state in the Union has, in the absence of constitutional prohibitions, fol-

lowed this theory adhered to by the Supreme Court of the United States.

Further, it has been repeatedly held by this court that the cost of street improvements, whether such improvements consisted in *acquiring* land for street purposes, or of grading, curbing and paving them after their acquisition, could be assessed against such adjacent, contiguous or abutting property as was peculiarly benefited by the improvement in a degree different from the benefits received by the public at large. *Meissner v. Toledo*, 31 Ohio St., 387; *Walsh v. Barron*, 61 Ohio St., 15.

The only case in which any court has apparently made a distinction is in the decision rendered by this court in the case of the *Railway Co. v. Cincinnati*, 62 Ohio St., 465.

Messrs. Dwyer & Roehm and *Messrs. Young & Young*, for defendants in error.

It appears from the petition that the assessments sought to be enjoined are both to pay compensation and expenses connected with the opening of two public streets in the city of Dayton. The provisions of the statute seem to justify the city in assessing these amounts according to the benefits upon the abutting adjacent and contiguous property.

But the question now is is such procedure and are such statutes constitutional under the constitution of Ohio?

The constitution contains the following provision, namely, Sec. 19 of Art. 1, concerning the inviolability of private property; Sec. 6 of Art. 13 concerning the organization of cities and Sec. 2 of Art. 12 concerning taxation by uniform rule.

The provision as to the inviolability of private property clearly prohibits the taking of private property for private use without the consent of the owner. *Reeves v. Wood Co.*, 8 Ohio St., 333.

Nor could private property be taken for private use even were there no constitutional provisions on the subject. *Shaver v. Starrett*, 4 Ohio St., 494.

The power of eminent domain is a general incident to sovereignty and is conferred on the general assembly by the general grant of legislative power. Section 7 of Art. 2; *Giesy v. Railroad Co.*, 4 Ohio St., 308.

Section 19 of Art. 1, is an express limitation in the power.

It appears from the petition that the assessment enjoined was sought to be made to pay the compensation and expenses in connection with the taking of private property to open public streets. A public street in a city is a road open to the public without charge. Such a road may be opened by proceedings in condemnation where the public welfare requires it. The taking of private property for such public purpose is therefore unquestionably in itself within the power of a municipal corporation. It can only be taken by the public and for the public and it must be aid for by the taker and the taker is the public.

After the property has been taken upon the theory that it is taken by the general public for the general public, how is it competent for this general public (in this instance the municipal corporation), after this theory of public use has served its temporary purpose, to then turn around and take the position that the use, benefit and advantage of the improvement is limited in reality, to a few individuals, owners of private property, in the vicinity, who are asked to

pay the entire expense, and to seek to compel them to do so by assessment against their will.

If it be true, as contended, that the land taken for a public street must be paid for by the public, then it must be paid for out of the general revenue, and general revenue, under Art. 12a, Sec. 2, can only be raised by taxation; that is, by a tax levied by a uniform rule, not by an assessment. *Hill v. Higdon*, 5 Ohio St., 243; *Schroder v. Overman*, 61 Ohio St., 1.

The principles laid down in the above cases are certainly directly in point and are decisive of the present case. It follows from them that the assessments sought to be enjoined are unconstitutional, invalid, and were properly enjoined, and the judgment of the circuit court should be affirmed. Along the same line we refer the court to the following: *Hammett v. Philadelphia*, 65 Pa. St., 146; *Washington Avenue*, 69 Pa. St., 352; *State v. Elizabeth*, 37 N. J. L., 330; *State v. Mayor*, 37 N. J., 415; *Tide Water Co. v. Carter*, 18 N. J. Eq., 518; *Macon v. Patty*, 57 Mass., 378; *Hall v. Kenosha*, 29 Wis., 205; *Jones v. Water Commissioners*, 34 Mich., 273; *Chicago v. Baer*, 41 Ill., 306; *Lee v. Ruggles*, 62 Ill., 427; *Burr v. Carbondale*, 76 Ill., 455; *Crawford v. People*, 82 Ill., 557.

Whether private property taken for street purposes is paid for out of the treasury by general revenue direct or out of the proceeds of bonds sold in anticipation of general revenue, in either event the city has no right to reimburse itself by assessment against the property of a few adjacent landowners.

These principles are clearly laid down in the opinion in the case of *Railway Co. v. Cincinnati*, 62 Ohio St., 465, in which, among other things, Burket, J., delivering the opinion of the court, says: "In *Zanes-*

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ville v. Richards, 5 Ohio St., 589, this court held that Sec. 2 of Art. 12 of the constitution is a limitation upon the power of taxation which the general assembly can grant to a municipality under this section, and that general revenue is required to be raised by uniform levy on all taxable property, alike without exemption."

BURKET, J. Some technical errors are alleged in the petition, but the question as to the power of the city to make the assessment, is the only one regarded as of sufficient importance to warrant a report of the case.

It was determined in the case of *Railway Company v. Cincinnati*, 62 Ohio St., 465, that Sec. 19 of Art. 1 of the constitution is a limitation on Sec. 6, Art. 13, as to the power of assessment, and with that holding we are still fully satisfied. In that case there was one dollar awarded to the railway company as compensation for lands appropriated, and over five hundred dollars assessed upon the remaining lands for compensation, damages and costs paid for lands taken in the same appropriation proceedings. It therefore seemed clear in that case that the assessment of over five hundred dollars was not an assessment back onto the remaining lands, to raise money to pay the one dollar and costs, but was in part at least an assessment to pay for compensation awarded to others; and as the whole assessment was held unconstitutional, the holding was in effect that no assessment could be made to raise money to pay compensation for lands taken by appropriation. We so understood that case, and what was said in the opinion was with reference to that understanding, and was not *obiter*, but argument to show that money

could not be constitutionally raised by assessment to pay compensation, damages and costs for lands appropriated by the public for public use.

The limitation of said section 19 of the constitution on said section 6 as to assessments, goes, not only to the extent of preventing the assessment of the compensation, damages and costs back onto the lands of the owner remaining after the taking, but to the full extent of prohibiting the assessment of compensation, damages and costs for land so appropriated, upon any real estate whatever. In short, money cannot be raised by assessment to pay such compensation, damages and costs, but such money must be raised by taxation. Were it otherwise, said section 19 of the constitution could be evaded and that done by indirection which cannot be done directly.

The public appropriates the land for public use, and the public must pay for the land it so takes. Nothing less than the public can appropriate lands by legal process for public use. If an assessment district should be formed and a petition filed by such district to appropriate private property for the use of such district, or the public, a demurrer to such petition would be sustained on the ground that the constitution gives no power of appropriation of private property to such assessment district, such district not being the public, and the power of appropriation being given by said section 19 to the public only.

The power of appropriation being given to the public only, and only for public use, it follows that the public, the taker, must pay for what it takes, because he who takes from another should himself make restitution, and not compel others to pay for what they have not taken. To permit the public to take private property for public use, and then compel

private persons to pay for such property against their will, upon the theory that their lots and lands are benefited, would lead to extravagance and often to oppression, while to compel the public, which takes the property for public use, to pay therefor, leads to economy and prudence in taking private property for public use, and therefore said section 19 was made a limitation on said section 6, and the power of raising money by assessment to pay for private property taken for public use, is thereby prohibited.

It is urged that in this case no property of the defendant in error was taken, and no assessment made back on the property remaining after such taking, and that therefore the principle in *Railway v. Cincinnati*, *supra*, does not apply. The answer is that the principle of that case is that said section 19 is a limitation on said section 6 to the extent of a total prohibition of raising money by assessment to pay for private property taken by the public for public use. The principle is not that those only whose property has been taken are free from assessment, but that no assessment can be made to raise money to pay for property taken by the public for public use.

To exempt those from whom some property has been taken, and assess others, would often lead to inevitable injustice. As the constitution was adopted to promote our common welfare, and for the equal protection and benefit of all, and as that instrument is consistent throughout, a construction which necessarily leads to injustice cannot be a true one, and should not be adopted, and therefore the construction of section 19 is and must be that private property taken by the public for public use, must be paid for by the taker by taxation on the general list, and not by assessment on a comparatively small district.

It is also urged that if said section 19 is a limitation upon said section 6 so as to prevent the raising of money by assessment to pay for private property taken for public use, that the same limitation prevents the raising of money by assessment to pay for sewers, surface improvement of streets, etc. This does not follow, for the reason that in sewers, surface improvement of streets, etc., there is no taking of private property by the public for public use; but on the contrary the public confers a special benefit upon the property and then enforces an assessment not exceeding the benefit so conferred. If the assessment should exceed the special benefit, it would be unconstitutional as to such excess, by reason of the limitation of said section 19 on the power of assessment. It was so held in *Chamberlain v. Cleveland*, 34 Ohio St., 551, and *Walsh v. Barron*, 61 Ohio St., 15.

While a sewer or surface improvement of a street may, to some extent, be used by the public, and therefore be in part for public use, the power of assessment exists only to the extent that the improvement is for the special benefit of the lots and lands to be assessed over and above the general benefit to the public. Said section 19 is a limitation upon the power of assessment for the use of the public, because to assess private property beyond the special benefits conferred thereon by an improvement, to pay for such improvement for the use of the public, would be taking private property for public use without first making compensation therefor; while to take back by way of assessment a part or all of the special benefit conferred by the improvement, is not a taking of private property for public use, and such assessments are not prohibited by said section 19 of the constitution.

It is urged that to affirm the judgment in the case at bar involves the overruling of *Meissner v. Toledo*, 31 Ohio St., 387; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Raymond v. Cleveland*, 42 Ohio St., 522, and *Krumberg v. Cincinnati*, 29 Ohio St., 69. This last case was reviewed in *Railway v. Cincinnati*, 62 Ohio St., 465, 482, and needs nothing further here. *Meissner v. Toledo*, 31 Ohio St., 387, construed the statutes then in force, and did not pass upon their constitutionality, but assumed them to be constitutional. The question of their constitutionality was not raised or decided. The case of *Chamberlain v. Cleveland*, 34 Ohio St., 551, was decided in the light of *Cleveland v. Wick*, 18 Ohio St., 303, and the question as to whether money could be raised by assessment to pay for private property taken for public use was not raised, and was not argued or decided, but was conceded by counsel and assumed by the court. In the subsequent case of *Raymond v. Cleveland*, 42 Ohio St., 522, the judge delivering the opinion, in speaking of that case on page 525, says: "It is sufficient to say that the validity of the statutes upon the subject was not questioned, nor was the power to make an assessment for the improvement doubted." The same is true of *Raymond v. Cleveland*, 42 Ohio St., 522. The validity of the statute and the power to make the assessment were both admitted in that case, and the only question argued, considered or decided was as to the proper construction of the statute, assuming the same to be constitutional. The question now before this court in the case at bar, was not raised in any of those cases, but was regarded as decided by *Cleveland v. Wick*, *supra*, and this last case having been overruled, the superstructure so far as founded

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thereon must fall. As to the questions passed upon in those cases in the *construction* of said statutes, and not their constitutionality, we regard the cases sound, and not in conflict with the conclusion reached by the court in this case.

Judgment affirmed.

SPEAR, DAVIS and SHAUCK, JJ., concur.

THE BALTIMORE & OHIO RAILROAD CO. v. GLENN.

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Husband has right of action, at common law, against one who wrongfully injures his wife—Right not abridged by Sections 3108 to 3117, Rev. Stat.

At common law, a husband has a right of action against one who wrongfully, or through negligence injures his wife, to recover for the resulting loss of her services, and for his necessary medical, surgical and other expenses in healing her injuries; and this right of action is not abridged or affected by the legislation embraced in Sections 3108 to 3117 inclusive of the Revised Statutes.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Licking county.

This case was heard and submitted with No. 7196, *The Baltimore & Ohio Railroad Company v. Melissa Glenn*. In that case Mrs. Glenn recovered a judgment in the lower court against the plaintiff in error, for damages sustained through the alleged negligence of the servants of the railroad company in so operating and running an engine in its yards over a public street in the city of Newark, as to strike her and crush her left foot in such a manner as to require amputation above the ankle. The injuries alleged in her case were the loss of the foot as a permanent injury, and the pain and suffering incident thereto. This

court has recently affirmed the judgment in her favor in that case.

The defendant in error in this case, James P. Glenn, is the husband of Melissa Glenn, and he brought his action against the railroad company, charging in his petition the same acts of negligence on the part of the company, and the same injuries to the wife which were contained in her petition. The recovery sought by the husband in this case, is for the loss of the services of the wife which resulted from her injuries, and also for money expended by him in her surgical and medical treatment in the endeavor to cure and heal them.

The railroad company filed a general demurrer to the petition of the husband in this case which was overruled by the trial court. An answer filed denied all allegations of negligence made against it, and charged contributory negligence upon the wife, Melissa. This charge was denied by a reply.

On the issues joined, the jury found for the plaintiff and assessed his damages. Thereupon the company moved the court for judgment on the pleadings notwithstanding the verdict. This motion was overruled, and also a motion for a new trial, and judgment was entered on the verdict. The circuit court affirmed this judgment, and error is prosecuted in this court to reverse both judgments.

The same grounds of error assigned for the reversal of the judgment of the wife, Melissa Glenn, are assigned in this case, with the additional claim that since the passage of the law found in Secs. 3108 to 3117, inclusive of the Revised Statutes, the husband has no right of action for the loss of the services of his wife occasioned by the negligence of another, nor, for her necessary surgical and medical attention; and

this question is preserved in the record by the demurrer to the petition, the motion for judgment on the pleadings and by exceptions to the charge of the court

Mr. J. H. Collins and Messrs. Kibler & Kibler, for plaintiff in error.

Of course, it is conceded that at common law the plaintiff below would have a cause of action for the injury to his wife.

But our contention is that under Secs. 3108-3117 of the Revised Statutes of Ohio, the common law rule upon this subject is entirely changed. The two elements of damages which the plaintiff sought to recover were for loss of the services of his wife and for money expended for medical attention. Under the sections of the statute referred to the defendant in error was not the owner of his wife's services. They belong to her exclusively, and if any recovery was had therefor, she was entitled to it in her suit against the company, and the same may be said of the medical expenses. That was her debt for which her husband was not liable, and if he paid it, he has no more right to recover than would a stranger. He was not liable for her debts, nor she for his. It is therefore respectfully submitted that the defendant in error was not entitled to recover any judgment against the railroad company.

Mr. B. G. Smythe and Mr. S. M. Hunter, for defendant in error.

No law has yet been passed depriving the husband of the services of his wife. In this case, he is not suing for the wages of her separate labor, nor for the violation of her rights. He is simply suing for the

loss of what was his own. The law still casts upon him the duty of caring for her, and the expense of her cure. And whoever deprives him of those wifely services, or makes those expenses necessary, must compensate him. *Pomeroy's Remedies*, Sec. 242; *Porter v. Dunn*, 131 N. Y., 314; *Brooks v. Schwerin*, 54 N. Y., 343; *Reynolds v. Robinson*, 64 N. Y., 589; *Coleman v. Burr*, 93 N. Y., 17; *Shanahan v. Madison*, 57 Wis., 276.

BY THE COURT:

In the case of the plaintiff in error against Melissa Glenn, recently affirmed, this court has decided all the questions of error which are common to both cases, and they will not be further considered in this opinion. Here, however, it is asserted by the plaintiff in error, that the wife, Melissa, having recovered for the injuries she sustained through the negligence of the railroad company, the husband, defendant in error, is without a right of action for his loss of her services while disabled by such injuries, or for expenses necessarily incurred by him in caring for her and healing her of the same. This assertion is connected with the proposition that if there once existed at common law in this state a right of action in the husband to recover on such grounds, it has been superseded or taken away by statute. It is not seriously questioned by counsel, that at common law, the husband is entitled to the society and services of his wife, and that for the invasion of such right to his damage, he could maintain an action. And this right of the husband is not affected by the fact that the wife has sued and recovered for the damages she has sustained.

It is not averred in the answer in this case, nor claimed in argument, that Mrs. Glenn, in her petition against the railroad company, made any demand for the expenses of her care, or medical or surgical treatment; and of course the loss of her services to the husband, while she was disabled by reason of her injuries, could have formed no part or element of her suit. Hence, it is still the law, that for such expenses and loss of services, the husband has a right of action against one whose negligence or wrong inflicted the injuries, unless the right is taken away by legislation. It is said this change has occurred by reason of Revised Statutes, Secs. 3108 to 3117, inclusive. These sections are found under the title "Husband and wife," and they make some brief provisions regarding the marriage relation, some of which are not new to, or an improvement upon the common law. For example, Sec. 3108 states that "husband and wife contract toward each other obligations of mutual respect, fidelity and support;" and Sec. 3110 makes it the duty of the husband to support himself, wife and minor children. If he is unable to do so, the wife must assist him so far as she is able. There is nothing new or novel in this statement of duty. The only other section which makes any approach to our subject is 3111, which provides that "neither husband nor wife has any interest in the property of the other, except" dower in real estate. This section does not abridge the common law right of the husband in this case. He is not asking for any interest in the property of the wife. She never had any interest in his cause of action. For her personal injuries and suffering incident thereto, she has exercised her separate right of action, but she has not and could not

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assert in her action the grounds for recovery which exist only in the husband.

In brief, there is nothing in these sections, or any of them, which abridges the right of the husband to recover as he has done in this case. The holdings of the lower court being in harmony with these views, its judgment is affirmed.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

GALE v. PRIDDY.

Trial by jury—General or special verdict—Section 5201, Rev. Stat., mandatory only, when—Trial court to exercise power of refusal to permit questions propounded with great caution—Court procedure.

1. A request that the court will direct the jury to render a special verdict in writing, upon any or all of the issues in the case, is not a request to instruct the jury that if they find a general verdict, they shall find specially upon particular questions of fact, as provided in Revised Statutes, Section 5201.
2. Revised Statutes, Section 5201, so far as it relates to special findings upon particular questions of fact, is mandatory only when the request therefor contains the condition that the questions which are submitted shall be answered in case a general verdict shall be rendered.
3. The trial court should exercise with great deliberation and caution the power of withdrawing or refusing to submit questions propounded; and although the questions must be such that the answers thereto will establish ultimate and determinative facts, and not such as are only of a probative character; yet questions the answers to which establish probative facts from which an ultimate material fact may be inferred as a matter of law, should be allowed. *Schweinfurth, Admr., etc., v. Railway Co.*, 60 Ohio St., 215, explained and qualified. *The Cleveland & Elyria Electric R. R. Co. v. Hawkins*, 64 Ohio St., 391, approved and followed.

(Decided June 10, 1902.)

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ERROR to the Circuit Court of Wood county.

Mr. W. G. Elliott and Messrs. Baldwin & Harrington, for plaintiff in error.

The question presented arises upon the construction of Secs. 5200 and 5201 of the Revised Statutes.

We contend that under these sections it is the right of a party to have a special verdict upon all or any of the issues joined. And upon this subject the court has no discretion as to whether pertinent interrogatories shall be submitted.

If the court is vested with discretion in the matter, of course the defendant could not complain: but if the statute means what it says in direct and positive terms, then certainly the court erred in denying to the defendant a substantial right.

We think the statute is not susceptible of any construction or interpretation which warrants the denial of this right. And so far as the statute has been directly under consideration by the courts, they seem to hold that its provisions are mandatory. *Railway Co. v. McCamey*, 5 C. D., 631; 12 C. C. R., 543; *Schweinfurth v. Railway Co.*, 60 Ohio St., 215; *Miller v. Southworth*, 5 C. D., 101; 10 C. C. R., 572; *Summers v. Greathouse*, 87 Ind., 205.

The record does not show affirmatively that the request to submit special interrogatories was coupled with any condition that the same were to be answered in case of the rendition of a general verdict. Our circuit court has held, in *Sun Oil Co. v. Insurance Co.*, 8 C. D., 145; 15 C. C. R., 355, that such condition in the request is essential.

We doubt the correctness of this decision, and fail to see the reason or philosophy of such requirement.

Mr. Chas. A. Strauch and Messrs. James & Beverstock, for defendant in error.

We admit that the question presented arises upon the construction of Secs. 5200 and 5201 of the Revised Statutes.

The question here presented has not, so far as we know, ever been presented to and passed upon by the Supreme Court of Ohio, and for that reason we must look elsewhere for a discussion of the question presented by courts construing similar statutory provisions.

Observe that Secs. 545 and 546 of the Indiana Code are counterparts of Secs. 5200 and 5201 of the Revised Statutes of Ohio.

The Supreme Court of Indiana, construing said Secs. 545 and 546, held that the request to submit interrogatories should be coupled with the condition that the same are to be answered in case of the rendition of a general verdict. *Manning v. Gasharie*, 27 Ind., 399; *Killian v. Eigenmann*, 57 Ind., 480; *Railway Co. v. Bowen*, 70 Ind., 478; *Railway Co. v. Worley*, 107 Ind., 320.

The record must show affirmatively (and counsel for plaintiff in error admit it does not) that the request to submit the interrogatories was coupled with the condition that the same were to be answered in case of the rendition of a general verdict. That condition is indispensable. *Sun Oil Co. v. Insurance Co.*, 8 Circ. Dec., 145; 15 C. C. R., 355; *Taylor v. Burk*, 91 Ind., 252.

Our position, aside from the Indiana authorities, is fully sustained by the opinion of Judge Parker, in *Sun Oil Co. v. Insurance Co.*, 8 C. D., 145; 15 C. C. R., 355.

BY THE COURT:

The question raised in this case is concerning the refusal of the court of common pleas to instruct the jury to find specially upon particular questions of fact submitted by the plaintiff in error, who was defendant in that court. This was assigned as error in the circuit court, and the judgment of the common pleas was affirmed. It appears from the record that at the close of the testimony, before the argument of the case, and at the time defendant submitted his request to charge, the defendant also submitted to the court, in writing, certain requests to direct the jury to give a special verdict in writing, upon certain issues as follows: (Here follows the title of the case, and continuing) "And we return the questions submitted to us with our answers thereto, as follows, to-wit:" (Here follow the questions with a blank space after each for answers thereto, concluding with) "Upon consideration whereof the court refused each and all of said requests severally, to which refusal defendant then and there excepted." It does not appear that the court was requested to instruct the jury "to find specially upon particular questions of fact," although questions seem to have been prepared and submitted to the court for the purpose of procuring such a special finding. Instead of such a request, the record shows that the defendant requested the court "to direct the jury to give a special verdict in writing upon certain issues," which is a very different thing. It does not appear that a special verdict on any "issues" was prepared and submitted as is the general and proper practice in such cases. 22 Ency. Pl. & Pr., 993; but it does appear that certain "particular questions of fact" were prepared, which coun-

sel doubtless desired to have answered by the jury. A "particular question of fact" (Sec. 5201, Revised Statutes) is something different from, and less than, an "issue;" and the object of the statute is that these special findings, if inconsistent with the general verdict, may control it. *Manning v. Gasharie*, 27 Ind., 399. It is stated in the record that "upon consideration whereof the court refused each and all of said requests *severally*." We are not able to say from that which is disclosed in the printed record that any of these questions called for more than evidentiary matter; but whatever may be the extent to which the trial court may scrutinize the questions submitted and eliminate from them, it has no right to withdraw, or refuse to submit, interrogatories which are pertinent and material. *Summers v. Great-house*, 87 Ind., 205; and although, as was held in *Schweinfurth v. Railway Co.*, 60 Ohio St., 215, 232, on authority of *Railway Co. v. Dunleavy*, 129 Ill., 132, 145, the questions must be such that the answers thereto will establish ultimate and determinative facts, and not such as are only of a probative character; yet this should not be construed to exclude questions the answers to which will establish probative facts from which an ultimate material fact may be inferred as matter of law. This is necessarily so in all cases which involve what are called mixed questions of law and fact; for there a general verdict implies the finding of the jury upon the ultimate facts which are necessary to support the verdict, while the findings of the jury may be such on the "probative" facts that the necessary legal inference would be exactly the opposite of the finding implied in the general verdict. For example, a general verdict may

imply a finding that there had been no payment made on the plaintiff's claim, while answers by the jury to interrogatories might disclose such evidentiary facts that the law would conclusively infer that there had been a payment. In such case the interrogatories could not lawfully be excluded from the jury. This in effect, if not in terms, was held by the unanimous vote of the judges in the case of the *Railroad Company v. Hawkins*, 64 Ohio St., 391. It was said in the Illinois case above cited: "Doubtless a probative fact from which the ultimate fact necessarily results would be material, for the court could infer such ultimate fact as a matter of law." 129 Ill., 135, 143. In any event the trial court should exercise great deliberation and caution in the matter of excluding interrogatories from the jury; for, while permitting immaterial questions is not likely to work injury after the verdict, the exclusion of a material one may be fatal to the rights of the party requesting it.

The statute, Sec. 5201, is mandatory upon the court to "instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact;" but it is so mandatory only when the court is so requested to instruct the jurors by either party. That the request for special findings shall contain the condition that the questions shall be answered in case a general verdict shall be rendered, is therefore not a matter of mere form but one of substance. This statute is identical with the statute of Indiana on the same subject and was adopted from that state. The Supreme Court of Indiana had repeatedly construed the statute as above, before its enactment here, as well as since that time. *Manning v. Gasharie*, 27

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Ind., 399; *Killian v. Eigenmann*, 57 Ind., 480; *Railway Co. v. Bowen*, 70 Ind., 478; *Taylor v. Burk*, 91 Ind., 252; *Railway Co. v. Worley*, 107 Ind., 320.

When a statute is adopted from another state where it has received a settled construction, the presumption is that such construction was adopted and that the terms of the statute are used in the same sense. *Gray v. Askew*, 3 Ohio, 466, 480; *Paine v. Mason*, 7 Ohio St., 198, 207; *Favorite v. Booher*, 17 Ohio St., 548, 554; *Hilliard v. Gas Coal Co.*, 41 Ohio St., 662, 669.

From the foregoing it is clear that there are, apparent upon the record in this case, several reasons why the judgment of the court below should be, and it accordingly is,

Affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

THE STATE OF OHIO v. WING.

Trial of criminal case—Testimony in previous trial by witness not dead—But beyond court's jurisdiction—Not admissible, when—Criminal procedure.

In the trial of a criminal case, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or limits of the state, is not admissible unless it appear to the satisfaction of the trial court, that the witness is absent through the connivance, or by the procurement of the accused.

(Decided June 24, 1902.)

EXCEPTION by the Prosecuting Attorney to decision of the court of common pleas of Hamilton county.

The defendant in error, Thomas Wing, in April, A. D. 1900, was arrested on a warrant issued by a justice of the peace of Hamilton county, on an affidavit filed with him which charged Wing with having committed the crime of robbery in said county on or about the 19th day of April, 1900. The accused was taken before the magistrate for a preliminary hearing and was represented by counsel.

Among the witnesses called and examined for the state was one Lizzie Waddell. She testified that she had known the accused for some years; that on the night of the robbery, at about 8:45 o'clock, he called at her room on Ninth street in Cincinnati, and displayed to her a roll of money, made up of five and ten dollar bills. She asked where he got the money, and he smiled, and told her to watch the newspapers in the morning. He gave her \$25 of the money with which to buy him some wearing apparel, and then left.

The magistrate found the facts sufficient to hold the prisoner to answer the charge in the court of com-

mon pleas, and it was so done. At the April term of that court; Wing was indicted by the grand jury for the same crime, for which he was bound over, and in December of the October term for the year 1900, he was put upon trial to a jury.

Lizzie Waddell, who had testified for the state at the preliminary hearing before the justice of the peace, did not appear at the trial in the court of common pleas. Search was made for her several days before the trial, by an officer with a subpoena, at the several places where she had resided in Cincinnati, and on the day before the trial was to begin, another officer also made search for her, but she could not be found. On these, and other facts, perhaps, the court found the witness was without the jurisdiction of the state of Ohio, and after diligent search could not be found.

The court having reached this conclusion, over the objection of the accused, permitted the state to offer and introduce the evidence of Thomas H. Darby, who was present and heard the testimony of Lizzie Waddell (the absent witness), at the preliminary examination on the same charge against the accused, which is contained in the indictment. Darby stated that he recollected her testimony, and narrated it to the jury as her testimony, to the effect above stated. Exception was duly entered by the prisoner. He was found guilty, and moved for a new trial on the grounds:

"1. Because the verdict was against the evidence.

"2. Because the court erred in permitting Thomas Darby to testify on behalf of the prosecution as to the testimony of one Lizzie Waddell, given at the preliminary hearing of this case before Justice Winkler."

The court overruled the motion as to the first, but sustained it as to the second ground, thus holding

that error was committed in allowing Darby to repeat at the trial, the evidence of Lizzie Waddell, given before the magistrate. A new trial was granted, to which, the prosecuting attorney, in behalf of the state, excepted, and made his exception part of the record by a proper bill of exceptions, which, on leave obtained, has been filed in this court, under the provisions of sections 7305 and 7306 of the Revised Statutes.

Mr. Victor H. Schafer, for plaintiff in error.

It is an old principle of law, so well settled that it needs no authority in its support, that in civil cases parol testimony may be given to prove the testimony of a witness who is either absent from the state or dead, who had testified at a former hearing of the same case.

A principle of law almost as well settled in this country and in England, is the one which holds that in criminal cases such testimony is competent where the witness is dead.

The statutes, 1st and 2nd Philip and Mary, Chap. 13, and in the 2nd and 3d Ph. & M., Chap. 10, followed by 7th Geo., 4th Chap., 64, which created the authority in justices to take written testimony of the accused, as well as the accusers, in criminal cases, were enlarged by the 11th and 12th Victoria, Chap. 42, commonly called "Jervis's Act." 2 Hale's Pl. Cr., 305; 2 Hawkins Pl. Cr., Chap. 46, Sec. 6.

It will be noticed that this authority wrote while the statute 1 and 2, Ph. & M. was in force, and even before the statute of 11th and 12th Victoria was passed. 2 Hale's Pl. Cr., Chap. 38.

Starke, on evidence, Vol. 2, page 486, refers to the statutes of 1 and 2 Ph. & M., and 2 and 3 Ph. & M.

In the case of *Thatcher & Waller*, in the time of King Charles II, the defendants being indicted and tried for murder, it was held that the deposition of the witness who was examined before the coroner of the household, might be read after it was shown to the court that he was gone beyond sea. See 6 Car. & P., 176.

It will be noticed from an examination of authorities that some were decided prior to the adoption of the tenth amendment to our present federal constitution, and it is the contention of the state that this was a well settled doctrine of law which the drafters of the constitution had in mind at the time of its adoption. An exception well recognized (the same as the exception allowing the testimony of the witness since deceased) to the general rules of evidence that hearsay is incompetent.

In this country the courts are at great variance in their holdings on this question. The only decision in this state is that in the case of *Summons v. State*, 5 Ohio St., 325.

As the objection is urged to the admission of this testimony that it is in contravention of the constitutional provision that the accused shall be allowed to meet his witnesses face to face, this case is an important one. See also *De Veaux v. Clemens*, 9 Circ. Dec., 647; 17 C. C. R., 33.

Outside of our own state we find this class of testimony is admitted in at least four states of the union—three of those states having exactly similar provisions in their constitutions, but one (California) having no such provision. *Hurley v. State*, 29 Ark., 17; *Shackelford v. State*, 33 Ark., 539; *Dolan v. State*, 40 Ark., 454; *Marler v. State*, 67 Ala., 55; *Lowe v. State*, 86 Ala., 47; *Thompson v. State*, 106 Ala., 67; *State v.*

Riley, 42 La. An., 995; *State v. Laque*, 41 La. An., 1070; *Greenleaf Evidence* (16 ed.), 282; *State v. Allen*, 37 La. An., 635; 34 La. An., 1088 and 1219; *People v. Devine*, 46 Cal., 45; *Cooley*, *Constitutional Limitations* (6 ed.), 387.

For the rule that this class of testimony is allowed in cases where the witness is dead, see *Summons v. State*, 5 Ohio St., 325; *United States v. Macomb*, 5 McLean, 286; 22 Ark., 371; *Brown v. Commonwealth*, 73 Pa. St., 321; *Johnson v. State*, 1 Tex. App., 333; *O'Brian v. Commonwealth*, 6 Bush, 563; *Commonwealth v. Richards*, 35 Mass. (18 Pick.), 434; *People v. Murphy*, 45 Cal., 137; 17 Ala., 354; *Nevada v. Johnson*, 12 Nev., 121; *State v. Hooker*, 17 Vt., 658; *State v. Elliott*, 90 Mo., 350; *Hair v. State*, 16 Neb., 601; *State v. Hallett*, 63 Ia., 259; 63 Ga., 692; *People v. Sligh*, 48 Mich., 54; 8 Car. & P., 167; 9 Car. & P., 601; *Kendrick v. State*, 29 Tenn. (10 Humph.), 479; *United States v. Wood*, 3 Wash. C. C., 440; *United States v. White*, 5 Cranch C. C., 460.

Mr. Norwood J. Utter and *Mr. Charles E. Tenney*, for defendant in error.

The contention of the defendant in error is as follows: At the trial of a criminal case evidence is not admissible to prove the testimony given at the preliminary examination, or at a former trial of the same case, by a witness, who has not been proven to be dead, but who has since left the jurisdiction of the court or can not be found. We admit that such evidence would be admissible in a civil case, or when the former witness is dead, and probably when he is insane, or too sick to attend. All such cases, therefore, are irrelevant.

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Ohio constitution, Art. 1, Sec. 10, "Gives permanency to, and secures against the power of change or innovation, the great fundamental principle long recognized at common law," that, with the recognized common law exceptions to the rule against hearsay, existing at the time of the adoption of the constitution, the party accused shall in all cases be entitled to meet "face to face" the original, as distinguished from the narrating or repeating witnesses against him. *Summons v. State*, 5 Ohio St., 325; *Motes v. United States*, 178 U. S., 458; *Mattox v. United States*, 156 U. S., 237; *State v. Houser*, 26 Mo., 431; *State v. McO'Blenis*, 24 Mo., 402; 1 Greenleaf on Evidence (16 ed.), 282.

And the constitutional provision is not to be evaded and rendered abortive by being satisfied with the presence of a mere narrating witness to be examined; there can be no new exceptions to the rule against hearsay in criminal cases since the adoption of the constitution. *United States v. Angell*, 11 Fed. Rep., 34; 1 Greenleaf on Evidence (16 ed.), 282.

The law to-day is therefore the same as the common law rule at the time of the adoption of the constitution. There has been no adjudication on the point in this state, and we must therefore look to the decision of other states of the United States and England. The common law rule on the subject before the adoption of the constitution is well shown in the trial of Titus Oates. 10 How. St. Tr., 1285, 1286 (A. D. 1685).

Morley's case, 2 Kelyng, 533, is another old English case, which sustains our contention.

The common law rule unaffected by any constitutional provision is further illustrated by the following cases from England: In *Regina v. Hegan*, 8 Car.

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& P., 167, the evidence was offered by the prisoner as in the trial of Titus Oates, *supra*. *Rex v. Savage*, 5 Car. & P., 143; *Queen v. Scaife*, 17 Q. B. (A. & E. n. s.), 238.

The statute on the subject passed after the trial of this case controls all subsequent decisions and this case is, therefore, the last common law decision on that subject. 3 Russell Crimes, 562; *United States v. Angell*, 11 Fed. Rep., 34; *Motes v. United States*, 178 U. S., 458.

The federal courts and the courts of many of the states have passed on the question, and almost unanimously support our contention. *State v. Houser*, 26 Mo., 431, is a most emphatic declaration of the principle we contend for.

The following authorities are fully in accord with the contention of the defendant in error: Stephens' Digest of Evidence, Art. 32 and notes; Cooley Const. Limit., 387 and note 4; Underhill Crim. Ev., Chap. 21, Sec. 260 *et seq.*; *State v. McO'Brien*, 24 Mo., 402; *Commonwealth v. McKenna*, 158 Mass., 207; *Le Baron v. Crombie*, 14 Mass., 234; *Weeks v. Lowerre*, 8 Barb., 530; *Mutual Life Ins. Co. v. Anthony*, 50 Hun, 101; *People v. Newman*, 5 Hill, 295; *Berney v. Mitchell*, 34 N. J. L., 337; *Hall v. State*, 65 Tenn. (6 Baxt.), 522; *State v. Oliver*, 43 La. An., 1003, 1005; *Brogy v. Commonwealth*, 51 Va. (10 Gratt.), 722; *State v. Conway*, 56 Kan., 682; *State v. Foulk*, 45 Pac. Rep., 603; 57 Kan., 255; *State v. Staples*, 47 N. H., 113; *Bergen v. People*, 17 Ill., 425; *Collins v. Commonwealth*, 75 Ky. (12 Bush), 271; *People v. Sligh*, 48 Mich., 54; *Gastrell v. Phillips*, 64 Miss., 473; *Gerhauser v. Insurance Co.*, 7 Nev., 174; *McLain v. Commonwealth*, 99 Pa. St., 86; *Cline v. State*, 36 Tex. Cr. App., 320.

The plaintiff in error seems to place considerable reliance on *Summons v. State*, 5 Ohio St., 325. This decision, however, expressly limits itself to the admissibility of the former testimony of witnesses who have since died. Death was assumed as necessary throughout the opinion, and the cases of absent witnesses were distinguished as not in point.

The distinction between death and absence is expressly drawn in the following cases: *Owen v. State*, 63 Miss., 450; *Hobson v. Doe*, 2 Blackf. (Ind.), 308; *Pittman v. State*, 92 Ga., 480; *United States v. Angell*, 11 Fed. Rep., 34; *Queen v. Scaife*, 172, B., 238; Trial of Titus Oates, 10 How. St. Tr., 1286.

The following cases are in strict accord with the decision in *Summons v. State*, 5 Ohio St., 325, in admitting the former testimony of dead witnesses: *Mattow v. United States*, 156 U. S., 237; *Commonwealth v. Richards*, 18 Pick., 434; *Stern v. People*, 102 Ill., 555.

Nevertheless the same courts refuse to admit the former testimony of absent witnesses, as shown by the following cases: *Commonwealth v. McKenna*, 158 Mass., 207; *Stout v. Cook*, 47 Ill., 530.

The distinction between civil and criminal cases is made in the following cases: *Owens v. State*, 63 Miss., 450; *Brogy v. Commonwealth*, 10 Gratt., 722; *Finn v. Commonwealth*, 5 Rand., 701; *United States v. Angell*, 11 Fed. Rep., 34; *McLain v. Commonwealth*, 99 Pa. St., 86.

Compare *Pittman v. State*, 92 Ga., 480, a criminal case, with the civil case of *Railway Co. v. Gravitt*, 93 Ga., 369.

The prosecution relies greatly on 1 Greenleaf on Evidence, 284, and the text undoubtedly sustains their contention. Mr. Greenleaf's citations, how-

- ever, fail to support the text, with the exception of the Alabama and Arkansas cases. The cases cited are all civil cases excepting those from Alabama, Arkansas, California and Louisiana. In California the constitution does not provide for the defendant meeting the witnesses "face to face" or "confronting" them: *People v. Cady*, 48 Pac. Rep., 908; Constitution of California (1849), Art. 1, Secs. 8 and 9.

In Louisiana the testimony of an absent witness is not admissible unless there is a "full and accurate deposition." *State v. Oliver*, 43 La. An., 1003; *State v. Timberlake*, 50 La. An., 308.

PRICE, J. The right of the state to question in this court, any adverse decision made in the trial of a criminal case by the trial court, is found in Revised Statutes, section 7305, which provides:

"The prosecuting attorney may except to any decision of the court, and present his bill of exceptions thereto, which the court shall sign, and the same shall be made a part of the record."

And section 7306 provides:

"The prosecuting attorney may present such bill of exceptions to the Supreme Court, and apply for permission to file it with the clerk thereof, for the decision of the court upon the points presented therein;

* * *"

As decided by this court in *State v. Granville*, 45 Ohio St., 264, the purpose of such bill of exceptions, is not to obtain a reversal, but to determine the law to govern in a similar case.

Therefore, we have for determination the sole question: Did the court of common pleas err in setting aside the verdict of guilty, because the evidence of Darby was incompetent? If his evidence was compe-

tent on the foundation laid for its admission, the court erred in granting a new trial; but if such evidence was incompetent, the court discharged its duty, in correcting the mistake on the first opportunity, by giving the prisoner a new trial.

If this question had arisen in the trial of a civil action, the way might be clear to sanction such evidence, where a proper showing is made for its introduction. Independent of statute, and at common law, there are many authorities which support the doctrine, that in civil actions, if it is made to appear to the satisfaction of the trial court that a witness, who has once testified in the same case, with opportunity for cross-examination, is beyond the jurisdiction of the court when the case is retried, his evidence upon the former trial may be given to the jury through the medium of one who heard and remembers it.

Some of the authorities on this point are cited in the brief for the state, and we will not refer to others which are equally clear.

In this state the legislature has moulded a rule in civil cases which is found in Sec. 5242a of Revised Statutes. This section provides that:

“Whenever a party or a witness, after testifying orally, die, or is beyond the jurisdiction of the court, or can not be found after diligent search, or is insane, or through any physical or mental infirmity is unable to testify, or has been summoned, but appears to have been kept away by the adverse party, if the evidence given by such party or witness has been or shall be incorporated into a bill of exceptions in the case wherein such evidence was given, as being all the evidence given by such party or witness, and which bill of exceptions shall have been duly signed by the judge or court before whom such evidence was given, the

evidence so incorporated into such bill of exceptions may be read in evidence by either party on a further trial of the case, and in case no bill of exceptions has been taken or signed as aforesaid, but the evidence of such party or witness has been taken down by any competent official stenographer, the evidence so taken by such stenographer, may be read in evidence by either party on the further trial of the case, and shall be deemed and taken as *prima facie* evidence of what such *deceased* party or witness testified to orally on the former trial; or, if such evidence has not been taken by such a stenographer, the same may be proven by witnesses who were present at the former trial, having knowledge of such testimony. All testimony thus offered shall be open to all objections which might be taken, if the witness were personally present."

This section is somewhat confused in its terms, and its application is not clear in a case where the evidence of the witness or party at a former trial has not been incorporated into a bill of exceptions in a case where it was given, and signed by the judge, or court before whom it was given. In case the evidence has been incorporated into a bill of exceptions and it has been duly signed by the judge, or court before whom it was given, the evidence contained in such bill, if it is all contained therein, may be read in another trial of the case, whenever, the party or witness, after having testified orally, *die*, or, is beyond the jurisdiction of the court, or, cannot be found after diligent search, or is insane, or through any physical or mental infirmity is unable to testify, or has been summoned, but appears to have been kept away by the adverse party. On the occurrence of such events the

evidence contained in the bill of exceptions, may be read in the further trial of the case by either party.

But when the right of the official stenographer to testify is reached later in the section, it is provided that the evidence taken by him, "may be read in evidence by either party on the further trial of the case, and shall be deemed and taken as *prima facie* evidence of what such *deceased* party or witness testified to orally on the former trial; or if such evidence has not been taken by such a stenographer, the same may be proven by witnesses who were present at the former trial, having knowledge of such testimony, etc."

It may be doubted whether or not the stenographer can testify in such cases where the *party* or *witness* who had testified on a former trial is not *deceased*, but living at the time of the further trial. The limitation is very close, and the language may well cause controversy, but we do not need to decide the question, for it is not necessary to do so in order to determine this case. If the right of the stenographer is confined to a case where the party or witness at former trial is deceased, like limitation may be claimed for one who was present at the former trial, having knowledge of the testimony of the party or witness.

The foregoing analysis of the section quoted is made, because, counsel for the state cite it as authority for the admission of the Darby evidence, although the section is a part of the code of civil procedure; but if we are to admit the claim, we would then be troubled to know whether the right to narrate what was said by a party or witness on a former trial, is not confined to the condition that such party or witness had died since the former trial.

However this may be, we are of opinion, that, unless there is other legislation which extends the provisions of this section to the trial of criminal cases, it will not apply. The common law rules regulating the competency of witnesses and their testimony have, as a general rule, applied to both civil and criminal cases. Where, for the trial of civil cases, a different rule was desired, the code of civil procedure has provided for the change. And if the furtherance of justice required a change of the common law rule as to the trial of criminal cases, the legislature has made the changes, as to the competency of parties, or witnesses, and has otherwise provided for the mode and manner of trial and procedure.

But the state claims that the foregoing section (5242a) has been extended to criminal procedure by the terms of Sec. 7289, Revised Statutes, which reads:

"Except as otherwise provided, the provisions of the code of civil procedure relative to compelling the attendance and testimony of witnesses, their examination, and the administering of oaths and affirmations, and proceedings for contempt to enforce the remedies and protect the rights of parties, shall extend to criminal cases, so far as they are in their nature applicable."

This section does not mention the *competency* of witnesses or their testimony, and does not extend the rules of civil procedure as to their competency to criminal cases; and hence does not serve the purpose claimed for it by the state.

We are, therefore, after all that is said about statutory rules and provisions, remitted to the common law for our guide in this case. If these statutory provisions can be extended to criminal cases, we are confronted with a question of their validity under our

fundamental law. Whether we turn to the codes of civil, or criminal procedure, or both; or to the rules of evidence at common law, we must look to the constitution of our state to see if the rights guaranteed by it to a citizen charged with a crime, are not infringed by permitting one who was present and heard the evidence of a material witness for the prosecution at one trial, to narrate his evidence on a second or further trial on the same charge, even if such witness is beyond the jurisdiction of the court and cannot be found at the time of the further or second trial.

Section 10, of our bill of rights provides:

“ * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face * * *”

A similar provision, in different language, is found in the federal constitution.

It has been frequently held, and by many different courts of high authority, that when these constitutions were adopted, both state and federal, they were adopted with a recognition of established contemporaneous common law principles, and as said in one of the cases, they did not repudiate, but cherished the established common law. This law being in the spirit of the adoption of the constitutional guaranty, whatever exceptions to the rule for the production of the witness for the prosecution at the trial then existed, remained as exceptions thereafter. Hence, it is necessary to learn if we can, the extent of the exceptions then recognized by the common law, especially as settled in the United States. This field of investigation is a large one, and we can here give but a summary and cite a few of the leading cases.

We have not before had this precise question before this court. There are two well known exceptions found in our state to the rule excluding hearsay evidence in criminal cases, but they are not decisive of this case.

One is where a witness for the state died after having testified, and at a subsequent trial on the same charge, it was permitted one who heard the testimony of the deceased witness and remembered it, to repeat the same on the second trial.

This was held to be proper in *Summons v. State*, 5 Ohio St., 325. The court in that case, held that "The clause of the 10th section of the bill of rights, providing that, *on any trial in any court, the party accused shall be allowed to meet the witnesses face to face*, which, like numerous other provisions in the bill of rights is a constitutional guaranty of a fundamental principle well established and recognized at common law, has reference to the *personal presence* of the witnesses called to testify, and not the *quality* or *competency* of the evidence to be given."

Speaking of this constitutional guaranty on page 341, Bartley, J., says: "The scope and operation of it are clearly defined and well understood, in the common law recognition of it, and the assertion of it in the fundamental law of the state, was designed neither to enlarge or curtail it in its operation, but to give it permanency, and secure it against the power of change or innovation."

The state cites that case, as sustaining its contention, and some language used by the learned judge, seems susceptible of that view; but taking the whole case and confining it to the point necessary to be decided, it is found not to do so.

And another well known exception to the rule, are dying declarations. *Summons v. State, supra*, and *Robbins v. State*, 8 Ohio St., 131.

The ground upon which such declarations are admitted in cases of homicide—declarations made *in articula mortis* by the subject of the homicide, is largely that of necessity in many cases, and became a rule mainly for that reason.

In some of the early cases in England another exception recognized in civil cases at least, was where the witness at the former trial was "*beyond the seas*" at the time of the second trial. What the same courts would now decide in such case, since rapid passage has robbed the ocean of most of its terrors, we do not know. Then the tedious and dangerous journey incident to existing means of navigation, might lead a court of justice, in civil, and perhaps in criminal cases, to admit the class of testimony under consideration.

But our research has failed to find a line of well considered cases in this country where, the fact that a witness, after having testified for the state in a criminal prosecution, has gone beyond its jurisdiction, will justify the introduction of his testimony at that trial, on a second trial, unless it appear that the absence of such witness is through the connivance or procurement of the accused.

We cannot discuss all the cases, or even quote from them, but we think the weight of authority is against such right in the state. There is no constitutional provision requiring the production of witnesses in court, in civil cases. There surely is such guaranty in criminal procedure.

In *The People v. Sligh*, 48 Mich., 54 the Supreme Court of that state, held that: "Witnesses in civil

State v. Wing.

cases are not required by any constitutional rule to be produced in open court. * * * The testimony of a witness in the trial of a criminal case, may be reproduced, if necessary, upon a later trial if the witness has meanwhile *died* * * * ." On page 56, Campbell, J., says: "The exception, if justified at all, can only be maintained on the ground of necessity, and to prevent a failure of justice. The cases which sustain it on the ground that the rules of civil and criminal evidence are identical, are not in our opinion correct."

In *State v. Houser*, 26 Mo., 431, the Supreme Court of that state held: "A deposition of a witness, taken upon the preliminary examination before a committing magistrate, in the presence of the accused, is not admissible in evidence on the trial upon proof that the witness is beyond the jurisdiction of the court."

2. If, however, the absence of the witness at the trial is procured by the defendant, the deposition would be admissible in evidence." A full discussion of this question is contained in that case.

In *Owens v. State*, 63 Miss., 450, it is held: "In a criminal trial, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or the limits of the state, is not admissible."

To the same effect is the case of *Pittman v. State*, 92 Ga., 480. There it is held: "The better opinion seems to be that though the *death* of a witness who testified at the commitment trial will render what he testified admissible in evidence in behalf of the state on the final trial of the accused for the same offense, yet the removal of the witness from the state and consequent inability to procure his attendance, the accused doing nothing to prevent his attendance,

will not, the witness being still alive, render such testimony admissible."

A similar holding is in *Brogy v. Commonwealth*, 10 Grattan, 722, decided by the Supreme Court of Appeals of Virginia. See also *McLain v. Commonwealth*, 99 Pa. St., 86.

In *Commonwealth v. McKenna*, 158 Mass., 207, the Supreme Judicial Court of that State held: "At the trial in the superior court, on appeal, of a criminal case, a witness cannot testify to what he heard another person, who is ill and unable to attend the trial, testify to at the trial of the case in the lower court." That court cites many cases to support its conclusions.

In *United States v. Angell*, 11 Fed. Rep., 34, the circuit court held: "Where a witness who testified at the preliminary examination of the defendant upon the same charge is living, but has gone out of and beyond the jurisdiction of the court, evidence of what he said on the former trial is inadmissible in a criminal prosecution."

The foregoing, and many of similar import not cited herein, come from states having constitutional guaranties on the subject like our own, and we are content in referring to another case decided recently by the Supreme Court of the United States: *Motes v. United States*, 178 U. S., 458.

In that case, Motes and others were indicted in the circuit court for the Northern District of Alabama for the crime of murder, committed in the execution of a conspiracy to injure, oppress, threaten, and intimidate one Thompson, because of his having informed the United States authorities of violations by the conspirators of the laws of the United States relating to distilling.

At the preliminary trial before a United States Commissioner, Taylor, one of the accused, testified, and his evidence was put in writing and signed by him. It was sufficient, if accepted, to establish the guilt of all of the defendants. The accused had opportunity to cross-examine him. At the final trial in the circuit court, Taylor, who had pleaded guilty, was called as a witness for the government, but did not respond. He had disappeared, although seen in the corridor of the court building an hour before being called. His absence was not by the procurement or advice of the accused, but was due to the negligence of the government officials. The circuit court, over the objections of the accused, allowed Taylor's written statements made under oath at the examining trial to be read in evidence to the jury. The accused was found guilty and sentenced for life. Held: "That the admission as evidence of the written statements made by Taylor at the examining trial was a violation of the rights of the accused under the clause of the sixth amendment to the constitution of the United States, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him."

In our judgment these cases contain the better and safer doctrine, as holding sacred the high guaranty for the protection of life and liberty, which should not, except for the best of reasons be weakened, invaded or destroyed. It is not invoking the old maxim sometimes abused, "that it is better that ninety-nine guilty persons should escape rather than one innocent man should suffer," but the maintaining of a plain and valuable right vested in every one accused of crime.

There is another reflection which we ought not to pass by. In the case at bar, the state made the showing at the trial, that the desired witness could not be found by the officers and was then beyond the jurisdiction of the court. By adjournment or continuance of the case to a future time, she might have been found and produced in court. The state should not be given undue advantage of a prisoner, and it may be, that in the hurried examinations which sometimes are practiced before magistrates in a large city, a cross-examination is greatly restricted, while, if the witness appears in the court of common pleas, the latitude of a full cross-examination, might properly increase the legitimate opportunities for a fair trial and an acquittal. There, the processes of sifting the evidence and ascertaining the truth are far superior to those available before a justice of the peace, or other examining magistrate. Hence, great caution should be exercised in allowing one to repeat at the final trial what a material witness may have said on the former hearing, and it should not be done except in clear and well recognized cases of necessity.

Entertaining these views, we conclude, that the admission of the Darby evidence by the court of common pleas was error, and that it was not error to set aside the verdict which followed its admission; and the exception of the state is overruled.

Exception overruled.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

HOUGH v. THE DAYTON MANUFACTURING COMPANY
ET AL.

66 427
67 244

Attachment does not apply to non-resident of state, when—Section 5521, Rev. Stat., as amended—Invalidity of act under law not in force.

The act amending section 5521 of the Revised Statutes, which was passed by the general assembly on the 26th of April, 1898 (repealed in 1900), did not make non-residence of this state a ground of attachment, and therefore, an order of attachment issued on that ground, while said amended section was in force, is invalid.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Franklin county.

The action in the lower court was brought by the defendant in error, The Dayton Manufacturing Company, to enforce the statutory liability of the stockholders of the Columbus, Sandusky & Hocking Railway Company, of which company the plaintiff below claimed to be a creditor in the sum of \$405.58. The petition was filed on the 4th day of January, 1899.

On the 15th day of March, 1899, the plaintiff amended its petition, making B. A. Hough, now plaintiff in error, a party defendant, alleging therein that, at the time the indebtedness of plaintiff was incurred, he was the owner and holder of ninety-nine shares of the stock of said railway company, and that he, with the other stockholders were liable to the plaintiff and other creditors of that company for the payment of the indebtedness. The insolvency of the railway company was averred in the petition. On the same day, the plaintiff in error was made defendant, March 15, 1899, an affidavit was also filed in the case which is as follows:

Hough v. Dayton Manufacturing Co. et al.

"Court of common pleas, Franklin county, Ohio. The Dayton Manufacturing Company, a corporation, plaintiff, v. The Columbus, Sandusky & Hocking Railway Company, a corporation, William H. Albery et al. Affidavit for attachment. Filed March 15.

"Edmond B. Dillon, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff herein; that the defendant, The Columbus, Sandusky & Hocking Railway Company, is a corporation organized and existing under the laws of the state of Ohio; that the defendant, Henry W. Putnam, was at the time the indebtedness to the plaintiff was incurred, as stated in the petition herein, to-wit, on or about the 14th day of May, 1895, has ever since been, and is now a stockholder of said defendant corporation, The Columbus, Sandusky & Hocking Railway Company, and was then, has ever since been and is now the owner and holder of four thousand shares (4,000) of the capital stock of said corporation, of the par value of \$400,000; that the defendant, B. A. Hough, was at the time the indebtedness to the plaintiff was incurred as stated in the petition, to-wit, on or about the 14th day of May, 1895, has ever since been and is now a stockholder of said corporation, and was then, has ever since been and is now the owner and holder of ninety-nine (99) shares of the capital stock of said corporation, of the par value of \$9,900; that this action is brought to enforce the liability of the stockholders of said corporation under the constitution and laws of the state of Ohio for the payment of the debts of said defendant corporation; that the claim sued on against said defendant, Henry W. Putnam, is his liability as such stockholder for the debts of said defendant corporation; that the claim sued on against said defendant, B. A. Hough, is his

liability as such stockholder for the debts of said defendant corporation; and that said claim against said Henry W. Putnam is just and said claim against said B. A. Hough is also just. Affiant believes that the said plaintiff ought to recover from the said defendant, Henry W. Putnam, in plaintiff's own behalf, and in behalf of the other creditors of said corporation, the sum of three hundred thousand dollars (\$300,000), with interest; and that said plaintiff ought to recover from the said defendant, B. A. Hough, in plaintiff's own behalf and in behalf of the other creditors of said corporation the sum of seventy-five hundred dollars (\$7,500) with interest. The defendants, Henry W. Putnam and B. A. Hough are each non-residents of the state of Ohio.

"The said indebtedness and liabilities of said defendants, Henry W. Putnam and B. A. Hough were respectively existing debts and contracts on the 26th day of April, 1898, and for more than two years prior thereto.

"Affiant further says he has good reason to believe, and does believe, that the Cincinnati Brewing Company, a corporation, has property of the defendant, Henry W. Putnam, in his possession, to-wit, money, credits and indebtedness due and owing by said The Cincinnati Brewing Company to the said Henry W. Putnam.

"Affiant further says that he has good reason to believe, and does believe, that the Security Title & Trust Company, a corporation, as receiver of the Turney & Jones Company, has property of the defendant, Henry W. Putnam, in its possession, to-wit: money, credits and indebtedness due and owing to the said Henry W. Putnam.

"EDMUND B. DILLON.

Hough v. Dayton Manufacturing Co. et al.

"Sworn to before me and subscribed in my presence by said Edmond B. Dillon, this 14th day of March, A. D. 1899.

"WILLIAM G. BROSSMAN,

"Notary Public, Franklin County, Ohio."

On this affidavit, a writ of attachment was issued by the clerk of the court, and the same was levied on lands of plaintiff in error in Perry county, Ohio.

In June following the levy, B. A. Hough, plaintiff in error, refusing to enter an appearance in the action, but appearing for the purposes of the motion only, asked the court to discharge the attachment for the following reasons:

1. The affidavit upon which said attachment was issued is insufficient in law.

2. The affidavit is untrue.

3. The liability sought to be enforced in this action is not a debt or demand arising upon contract, judgment or decree, or for causing death by a negligent or wrongful act.

4. The action of plaintiff is not one in which an attachment can be lawfully issued under the laws of this state against a nonresident, upon the ground of such nonresidence.

In October, 1899, this motion came on for hearing and the same was overruled, to which ruling Hough excepted. The circuit court affirmed the order of the court of common pleas, and the case is here to reverse the judgments of both courts, as to the attachment proceedings.

Mr. Lawrence Maxwell, Jr., and Messrs. Donohue & Spencer, for plaintiff in error, cited and commented upon the following authorities:

Section 5521, Rev. Stat.; *Auerbach v. Swadner*, 10 Circ. Dec., 435; 18 C. C. R., 389; *Woodbury v. Berry*,

18 Ohio St., 456; *Sayles v. Bates*, 15 R. I., 342; *Reciprocity Bank, In re*, 22 N. Y., 9; *Witters v. Sowles*, 35 Fed. Rep., 640; *Robinson v. Turrentine*, 59 Fed Rep., 554; *Kerr v. Urie*, 86 Md., 72; *Tabor v. Mining Co.*, 14 Fed. Rep., 636; Bliss Code Pl., Secs. 128, 152; *Adkins v. Loucks*, 107 Wis., 587; *McConn v. Railroad Co.*, 50 N. Y., 176; *Bidleason v. Whytel*, 3 Bur., 1545; *Wyman v. Mitchell*, 1 Cow., 316; *Paper Co. v. O'Dougherty*, 32 Hun, 255; *Hawkins v. Furnace Co.*, 40 Ohio St., 507; *Andrews v. Bacon*, 38 Fed. Rep., 777; *Electric Fixture Co. v. Light & Power Co.*, 8 Dec., 134; 6 N. P., 218; *Colwell v. Bank*, 2 Ohio, 229; *Taylor v. McDonald*, 4 Ohio, 149; *Humphrey v. Wood*, Wright, 566; *Waples on Attachment*, 27.

Mr. C. E. Burr and *Mr. W. O. Henderson*, for defendant in error, argued orally.

Mr. E. B. Dillon, for defendant in error, cited and commented upon the following authorities:

Section 5521, Rev. Stat.; *Auerbach v. Swadner*, 10 Circ. Dec., 435; 18 C. C. R., 389; *Electric Fixture Co. v. Light & Power Co.*, 8 Dec., 134; 6 N. P., 218; *Gas Company v. Collins*, 10 Circ. Dec., 475; 19 C. C. R., 247; *Dabney v. Pappenheimer Co.*, 10 Circ. Dec., 803; 20 C. C. R., 707; *Kennedy v. Bank*, 97 Cal., 93; *Kirtley v. Holmes*, 45 W. L. B., 231.

PRICE, J. The motion filed in the lower court to discharge the attachment levied on the property of plaintiff in error, presented two important questions arising out of the provisions of the attachment law found in Sec. 5521, Revised Statutes, as amended April 26, 1898, and the same questions were in controversy in the circuit court, and have been brought to this court by petition in error.

The ground upon which an attachment was demanded and issued against B. A. Hough, plaintiff in error, was, that he was at the time of filing the affidavit, a nonresident of the state of Ohio; and to bring the right to the writ within the last clause of the above section, the affidavit set out the fact that when the debts were incurred by the railroad company, Hough owned and held ninety-nine shares of its stock, and still owned them when the action was brought in the lower court, in which writ of attachment was issued, and that the Dayton Manufacturing Company, a defendant in error, for itself and the other creditors had brought the action to enforce the liability of the various stockholders, including the plaintiff in error. It was claimed in the courts below, as it is here, that when defendant in error, The Dayton Manufacturing Company, commenced its action against the stockholders of the insolvent railroad company, and also when, by amended petition, the plaintiff in error, was made a defendant in the action, nonresidence of the state, was not a ground of attachment; and also, that the holder of stock sustained no contractual relation to the creditors of the corporation, and that the plaintiff's debt or demand, as to the stockholders, did not arise upon contract, judgment or decree, and therefore not a claim or demand for which an attachment might be issued, on the ground of nonresidence of the state.

The first question requires an examination of the statute in force when the action was commenced in the court of common pleas, and the attachment issued in the case by the clerk of that court.

The petition was filed on the 4th of January, 1899, and was amended, bringing in the plaintiff in error March 15, 1899. The affidavit was filed, and a writ

of attachment issued on the same day, and a levy was made soon after that time. From these dates, it is shown, that section 5521, as amended April 26, 1898 (93 O. L., 318), was in force.

Previous to the amendment, in stating the first ground upon which the plaintiff may have an attachment, the language was:

"1. When the defendant, or one of several defendants * * * is a nonresident of the state."

The section, as amended in 1898, provides: "1. When the defendant, or one of several defendants, is a foreign corporation, except as provided," etc.

By the language of that amendment, nonresidence as a ground of attachment was wholly omitted, and it thus stood and was in force when the attachment involved was procured. Taking the plain and ordinary reading of the law then in force, there was no foundation for the writ of attachment, because of the nonresidence of the defendant below. If we had no knowledge of previous legislation on the subject, we naturally would understand, that for nonresidence of the state, there existed no right of attachment, and therefore the attachment proceedings in this case, were invalid. But it is argued with some degree of force, that the words or clause as to nonresident debtors, were, or was omitted by oversight, or through some mistake, and that the legislature did not intend, when enacting the amendment, to omit those words; and claiming this, we are asked to construe the section as to nonresidents as if the words had been retained in the amendment. One of the arguments for this right of construction is, that the last clause of the amended section, as did the original, provides: "But an attachment shall not be granted on the

ground that the defendant is a foreign corporation, or nonresident of this state, for any other claim other than a debt or demand arising upon contract, judgment or decree, or for causing death or a personal injury, by a negligent or wrongful act." As a strong re-enforcement to this clause, we are referred to Sec. 5523, which was not changed by the act of April 26, 1898. The latter section reads: "When the ground of the attachment is that the defendant is a foreign corporation, or a *nonresident of this state*, the order of attachment may be issued without an undertaking; * * *." It is said that this section and the above clause quoted from Sec. 5521, cast light upon legislative intent to not sacrifice "nonresidence," as a ground of attachment, because if such a sacrifice was intended, the quoted provisions would have been modified or changed accordingly.

We recognize the rule, that where a statute is of doubtful meaning, other statutes in *pari materia*, will be looked to in aid of construction. But, we cannot forget, that Sec. 5521 alone provides the *grounds* of an attachment; and Sec. 5523 provides in what case an undertaking may not be required, and if required, its character and mode of approval. If, on the face of the amendment in question, there is doubt of its meaning, or even as to its subject-matter, through want of proper punctuation, or, confusion in the order of words, and the doubt can be removed and the intent gathered by reference to cognate provisions, it would be our duty to use them in aid of construction to learn and carry out the legislative intent. But there is nothing doubtful, ambiguous, or confused in the wording of the provision. There is no doubt of the meaning of every word used, and that each word is in its proper place, and the en-

tire statement of the ground of attachment perfectly clear. In such case there is no room for construction. The omission was apparently intended, because the most apt words were used to indicate it. Can this court legislate and supply a ground for attachment not in the statute, on the mere presumption that it was omitted by the mistake of the general assembly? A mistake of legislative judgment, or, a mistake in drawing the bill constituting the amendment? The only method known to us, by which such mistake could be shown, would be to hear parol evidence—a thing not permissible.

An illustration might be pertinent here. Up to the year 1878 the last clause of Sec. 5521, read: "But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state, for any other claim than a debt or demand arising upon contract, judgment or decree." In 1878 the general assembly added the following: "or for causing death or a personal injury by a negligent or wrongful act." (75 O. L., 712.)

If the general assembly of 1898 had also omitted this addition, could we assume that the omission of this clause, which had a place in the statute for twenty years, was merely through mistake, and that it was the legislative intent to include the clause?

There is another section of the attachment law that demands recognition here. It is Sec. 5522, naming the requisites of an affidavit for attachment. It reads:

"An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit, of the plaintiff, his agent, or attorney, showing:

- "1. The nature of the plaintiff's claim.
- "2. That it is just.
- "3. The amount which the affiant believes the plaintiff ought to recover; and,
- "4. The existence of any *one of the grounds for an attachment enumerated in the preceding section.*"

The preceding section (5521), as amended and in force when the action was commenced and attachment issued, did not make nonresidence of this state a ground of attachment, and while the affidavit alleges it as a basis for the writ or order, it was not one of the grounds *enumerated* in the preceding section. For want of such ground the clerk had no authority to issue the order. How could the clerk of the court supply an absent ground of attachment except by parol evidence as to what was intended?

It is through a sufficient affidavit in a proper action, and by virtue of *positive*,—not negative law, that the court can gain jurisdiction of the property of a defendant by attachment. There was no positive law for attaching the property of a nonresident in this case, and authority for so doing is not made up by law of a negative character found in the last clause of 5521, and the provision for undertaking, as found in Sec. 5523.

In the Hathway case, 4 Ohio St., 383, the court says on page 385:

"That it is a maxim of interpretation, that, in the absence of ambiguity, no exposition shall be made, which is opposed to the express words of the instrument. The language of a statute must be taken in its usual and ordinary signification, and a court is not allowed to make an interpretation contrary to the plain and express letter of the law. Where the sense of a statute is evident, and expressed in clear

and precise terms, not leading to conclusions which are absurd and at war with the manifest intention of the law, to go off upon a conjecture, and travel in quest of extraneous matters, in order to restrict or enlarge its operation, would be a dangerous and gross perversion of the law itself."

In the case of *Woodbury & Co. v. Berry*, 18 Ohio St., 456, this court held:

"Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute, it may be convinced that the legislature intended to enact something different from what it did in fact enact."

We quote as entirely appropriate here, the language of Brinkerhoff, J., found on pages 461 and 462 of that case, where, speaking of the statute then under consideration, he says:

"These considerations, and a comparison of the provisions of these sections of the statute as they stand with those of the statute which was superseded and repealed by the code of civil procedure, not only suggest the conjecture, but convince us of the fact, that the words, '*other than the county*,' or some equivalent phrase, must have been by accident or oversight of the draftsman of the bill to establish a code of civil procedure, or of the clerk who engrossed it, omitted before the words, '*from which the execution issued*' in Sec. 455. But, notwithstanding all this, *ita lex scripta est*. The language as it stands is clear, explicit and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied, by considerations outside of the language, that the legislature intended to

enact something very different from what it did enact. But it did not carry out its intention, and we cannot take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions."

These are but the expression of many authors and authorities on the subject of statutory construction.

But it has been argued, that if this view of the law must be taken, the attachment is saved by Sec. 3 of the act of April 26, 1898, which section is: "This act shall not extend to or affect any existing debt, contract, note or judgment."

It is very evident these words do not mean an existing cause or ground of attachment, and we think they are to be understood in connection with the first three sections of the amendatory act of April 26, 1898, which sections provide some changes in the law of exemptions from execution, and that the changes wrought by the amendment in this respect, should not extend to or affect any existing debt, contract, note or judgment. Manifestly, this saving section (3), relates to a then existing cause of action, or one reduced to judgment, and not to a cause or ground of attachment contained in the affidavit.

The fourth section of the act provides: "That this act shall take effect and be in force from and after its passage." Unless there is an exception provided for, in this act or some general law, the former statutes, so amended are superseded. It seems to us that the exception made in Sec. 3, relates to the right or rights of exemptions, and that a then existing "debt, contract, note or judgment" should not be affected by the enlargement or change in the right of exemptions. These are proper words for the purpose, and they are not the proper words to save a ground of, or right to

an attachment which existed when the amendatory act was passed. If it had been intended to preserve to a creditor a ground of attachment then existing, other, further, and more apt words for that purpose would have been used. While the existing "debt, contract, note or judgment" is not affected, the former ground of attachment—nonresidence, disappeared.

We have looked still further for saving grace in this case, and we find that Sec. 79, Revised Statutes, is of no avail. It is not alleged in the affidavit that the plaintiff in error was a nonresident of this state when the act of April 26, 1898, was passed, and therefore, no then existing "*cause of proceeding*" * * * appears in the affidavit that invokes aid from Sec. 79.

We are of opinion that the courts below erred in sustaining the attachment in this case, and their judgments are reversed, and the attachment is discharged.

This disposition of the case renders it unnecessary to decide the other question as to the relation which a stockholder sustains to a creditor of the corporation, —whether contractual or otherwise.

Judgment reversed.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

66	440
67	80 ^h
167	531

**CITY OF CINCINNATI v. TRUSTEES OF THE CINCINNATI
HOSPITAL.**

Power to issue bonds for city hospital is corporate power—Section 1 of article 13 of constitution—No exception on account of emergency—Act of April 29, 1902, regulating Cincinnati Hospital, is void—Constitutional law.

1. The power to issue bonds to raise funds for the repair and extension of a hospital belonging to a city, and, to levy a tax upon all the taxable property within such city, for their payment, is corporate power.
2. The conferring of such power by special act is inhibited by section 1 of article 13 of the constitution, which ordains that "The general assembly shall pass no special act conferring corporate powers," and to the effectiveness of the inhibition it is immaterial whether the act designates as the donee of such power the municipality itself, or an agency through which it ordinarily acts, or such extraordinary agency as a board of trustees.
3. The comprehensive terms of this section do not admit of any exception on account of any supposed or real emergency.
4. The act of April 29, 1902, entitled "An act to supplement an act entitled 'An act regulating the Commercial Hospital of Cincinnati' (now the Cincinnati Hospital), passed March 11, 1861," is void because repugnant to this section of the constitution.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Hamilton county.

The plaintiffs in error were plaintiffs in the court of common pleas where they brought suit against the defendants in error, alleging that the defendants, as trustees of the Cincinnati Hospital, were about to issue bonds of the city of Cincinnati, in the sum of \$500,000, in the exercise of authority assumed to have been conferred upon them by the act of April 29, 1902, entitled "An act to supplement an act entitled 'An act regulating the Commercial Hospital of Cincinnati,'

Cincinnati v. Trustees of Hospital.

now the Cincinnati Hospital, passed March 11, 1861, volume 58 of Ohio Laws, page 151;" and further alleging that the act is unconstitutional for the two reasons that it is a special act conferring corporate power, and that it is a law of a general nature, but not of uniform operation throughout the state, and that the issuance of the bonds and the expenditure of the money realized would be a misapplication of public funds and an abuse of the powers of the defendants as such trustees, and pray that the defendants might be enjoined from issuing the bonds. The scope and purpose of the act sufficiently appear from the following:

Section 1. The board of trustees, appointed under the provisions of the act to which this is supplementary, are authorized and empowered to make additions to and alterations and improvements in the hospital or branch hospitals in control of said board, to construct new hospitals or branch hospitals, to provide for the equipment thereof, and to require by purchase, appropriation proceedings, or otherwise, on behalf of the city of Cincinnati real estate within and without the limits of said city for hospital and branch hospital purposes.

Section 2. Whenever it is necessary, in the opinion of said board to appropriate real estate for the purposes aforesaid, it is hereby authorized to commence and conduct, in the name of such city, proceedings therefor under and according to chapter three, division seven, title twelve of the Revised Statutes of Ohio, and the acts amendatory and supplementary thereto; and no concurrent action of any board or officer shall be necessary, and all the power with respect to said proceedings that are vested in any other

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board or officer of said city shall be vested in and may be exercised by said board of hospital trustees.

The eighth subdivisions of section three define the procedure to be observed by the trustees in making contracts for the construction or reconstruction of any building in whole or in part. The eleventh section provides for the sale of real and personal property in the control of said trustees and not required for hospital purposes, and for the payment of the proceeds of such sales to the trustees of the sinking fund of said city to be placed to the credit of a fund for the final redemption of the bonds whose issuance the act assumes to authorize.

Section 5. To provide a fund with which to pay the cost and expense of the improvements authorized by this act, said board of trustees is hereby authorized and empowered to issue bonds, in the name of the city of Cincinnati and under the corporate seal thereof, in the sum not to exceed five hundred thousand (\$500,000) dollars; said bonds shall be made payable in not less than ten years nor more than forty years from the date of their issue, bearing interest not to exceed three and one-half per cent. per annum, payable semi-annually, and shall be signed by the president of said board of trustees, and the mayor of the city of Cincinnati and be attested by the auditor of said city, and shall be secured by the pledge of the faith of said city and by a tax which it shall be the duty of the said board of trustees to levy or cause to be levied annually upon all the taxable property of said city, and to certify or cause to be certified to the county auditor, in an amount sufficient to pay the interest upon said bonds and to provide a sinking fund for the final redemption thereof; said tax shall be in addition to the amount now authorized by law

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to be levied for municipal purposes. Said bonds shall be known as "Hospital Improvement Bonds," and the proceeds thereof shall be paid out by the treasurer of such city upon warrants drawn by the auditor or other auditing officer of said city, upon the order of said board of trustees.

Section 6. This act shall take effect and be in force from and after its passage.

The action was brought by the corporation counsel upon the request of a taxpayer, not only to enjoin the issuance of the bonds but also to enjoin the expenditure of any money under the provisions of the act. The defendants filed an answer denying the legal conclusions stated and implied in the petition respecting the unconstitutionality of the act, and containing the following allegations:

Further answering the defendants say that there has existed for a long time, and still exists, in said city of Cincinnati, a local and temporary emergency which justifies and requires the said act of April 29, 1902, entitled "An act to supplement an act entitled 'An act regulating the Commercial Hospital of Cincinnati' (now the Cincinnati Hospital), passed March 11, 1861," in that the said Cincinnati Hospital and its branches located in said city of Cincinnati, are wholly inadequate and insufficient to accommodate the sick in said city and to meet the purposes and objects for which said hospital was originally built; that owing to deterioration, decay, lack of repairs and otherwise, and owing to the growth of the city of Cincinnati since April 3, 1868, an issue of \$500,000 of bonds as provided for in said act of April 29, 1902, is absolutely necessary to enable said hospital to meet the urgent demands existing in the city of Cincinnati at the present time; that no such emergency or neces-

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sity exists in other parts of the state which requires like legislation applicable to such other parts of the state.

A demurrer to this answer having been interposed by the plaintiff it was overruled by the court of common pleas, and the plaintiff not desiring to plead further a final judgment was rendered dismissing the petition. On a petition in error the judgment of the court of common pleas was affirmed by the circuit court.

Mr. Charles J. Hunt, corporation counsel, for plaintiff in error.

Mr. William H. Jackson, attorney for defendants in error.

SHAUCK, J. Counsel seem to agree that whether the Cincinnati Hospital was originally a state or a municipal institution it is now, by virtue of numerous legislative enactments, an institution of the city. If its character is now municipal, as it appears to be, the act of April 29, 1902, is not within the condemnation of *Wasson v. The Commissioners*, 49 Ohio St., 622, and *Hubbard, Treasurer, v. Fitzsimmons*, 57 Ohio St., 436, which determine that an institution of the state for the accomplishment of its general purposes must be established and supported out of its general revenues, such purposes not authorizing a local imposition.

Regarding the hospital as a municipal institution, the act referred to is said to be repugnant to the first section of the thirteenth article of the constitution which ordains that "The general assembly shall pass no special act conferring corporate powers." No artifice is employed to limit the operation of this act to Cincinnati by a description or classification from

which all other municipalities of the state are excluded. Its operation is expressly limited to Cincinnati, and its special character is not disputed. We do not find in the brief of counsel for the defendants in error any attempt to give a definition of the phrase "corporate powers" which would not include some of the powers which were sought to be conferred by this act, nor any exposition of the subject which would lead to the conclusion that this act is valid if the words of this provision of the constitution are used in their ordinary sense. So far, therefore, as principles are concerned, we have the plain provisions of the fifth section of this act to authorize the issuance of bonds in the sum of \$500,000, and the levying of a tax upon the property of the people of Cincinnati to pay those bonds with accruing interest; and the subject may be disposed of by the proposition, obviously sound and incontestably established by repeated decisions, that the power of taxation when conferred upon a municipality is "corporate power." Among such decisions are the *State ex rel. v. City of Cincinnati*, 20 Ohio St., 18; *State v. Pugh*, 43 Ohio St., 98; *Railway Company v. Martin. Treasurer*, 53 Ohio St., 386.

But the insistence of counsel is, rather, that former decisions of this court require the conclusion that the act under consideration should be permitted to operate as though it were reconcilable with the constitutional limitation quoted. The first of the cases cited is *The State ex rel. v. Davis et al.*, 23 Ohio St., 434. The legislation there considered provided for the regulation and management of the hospital whose improvement and enlargement are contemplated by the present act. Upon examination of the brief of counsel for the state in that case

it appears that it was not thought that the power of taxation was conferred by the act whose validity was there challenged. It provided for the management and operation of an institution which had been erected with funds raised by taxation under favor of earlier enactments. In the opinion the court expressly excluded from its consideration the validity of the act by which that taxation had been authorized. Since the court did not then decide the point which is most conspicuous in the present case we have no occasion for comment upon those which it did decide.

Counsel also cite the opinion of this court in the *City of Cincinnati v. Taft et al.*, 63 Ohio St., 141. Brief as is that opinion it is much too long, and it far exceeds the requirements of the case in which it was written, if it encourages belief in the validity of an act of the character of this. Nothing was there decided except that there may, by special act, be conferred upon the city authority for the renewal and ultimate payment of its bonds which are valid because purchased by the holder in reliance upon the decision of this court affirming the authority to issue them. To that precise point the syllabus is limited. Much care was bestowed on the opinion for the purpose of excluding the inference that the doctrine of the case might be extended to special acts for the creation of a new indebtedness to be discharged by additional municipal taxation.

Counsel for the defendants in error further insist that a conclusion favorable to the validity of this act results from the application of the doctrine of *Platt, a taxpayer, etc.*, v. *Craig et al.*; and *Jones, Mayor, v. The State of Ohio ex rel.*, 66 Ohio St., 75, it being assumed that in the view there taken a local and temporary emergency may arise in a municipality

to meet which the general assembly may by special act confer corporate power. To make the doctrine thus imputed to that case available in this the answer was filed alleging the existence of such local and temporary emergency. A sufficient answer to this contention is that such doctrine is not decided in nor encouraged by the case cited. The second proposition of the syllabus and all the observations in the opinion have express reference to Sec. 26 of Art. 2 of the constitution. It was obvious not only to the member of the court who wrote the opinion in that case, but to all of us, that the unconditional terms of the inhibition against special acts conferring corporate power would not admit of any exception. Furthermore, we were well aware that in the constitutional convention it was proposed to amend Sec. 1 of Art. 13, by adding to the words "The general assembly shall pass no special act conferring corporate powers" the following qualification: "except for municipal purposes and where in their judgment the objects can be better attained than under the general law." The defeat of the proposition to amend and the submission and adoption of the unqualified inhibition are suggestive. It adds to that suggestiveness to observe in the debates that the proposed amendment was defeated because its adoption would admit the omnipotence of the general assembly and continue the former evils from which an escape was much desired, and that this would necessarily result because the submission to the judgment of the general assembly of the necessity for a special act would relieve the courts of the duty of declaring any such acts void. The amendment having failed, adjudications upon this subject should not proceed as though it had been adopted.

The intervention of a board of trustees with authority to issue the bonds to raise the funds required for the contemplated extension of the hospital, and to levy or cause to be levied a tax upon all the taxable property of the city for their redemption, cannot be regarded as relieving the act from the inhibition of this provision of the constitution. The inhibition is against the granting of corporate power by a special act and the name under which the donees of the power may be designated cannot be material. The act contemplates that the trustees shall be the agents of the city, vested with authority to exercise the power of taxation with respect to all the taxable property within its limits. The trustees are without individual interest in the hospital or in the purpose to be accomplished. To regard them as vested by the act with a corporate character distinct from that of the city whose powers they are to exercise would relieve the act of none of the objections urged against it since in, that view, the act would create a new corporation or confer the power upon an existing corporation, and these are ends which cannot be reached by a special act. This question was determined in accordance with these views by the unanimous decision of this court in *Railway Company v. Martin, Treasurer*, 53 Ohio St., 386.

It is not necessary to determine the soundness of the proposition urged by counsel for the plaintiff in error that the act is also repugnant to the 26th section of the second article of the constitution, which ordains that "All laws of a general nature shall have a uniform operation throughout the state," but there is propriety in adverting to that section in connection with the section already considered. They were in their combined effect admirably adapted to cure the

legislative evils which resulted from the enactment of many laws which challenged the interest of a single representative, or representatives of a single county, but secured the votes of a majority in consideration of a return of the supposed favor. They were adopted to the end that the state should be governed by a system of laws to be passed by a majority of the legislative votes all of which should be prompted by approving opinions. The words of Ranney, J., in *Atkinson v. Railroad Co.*, 15 Ohio St., 21, concisely state the evil and the remedy:

"Constitutional provisions would be of little value if they could be evaded by a mere change of forms. These provisions of the constitution are too explicit to admit of the least doubt, that they were intended to disable the general assembly from either creating corporations, or conferring upon them corporate powers, by *special acts* of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution, as will preserve its great leading objects intact; and we now proceed to inquire, whether this enactment can stand consistently with the full and just effect of these provisions."

It was never possible that legislation so enacted should represent the combined wisdom of the senators

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and representatives. It is now an offense against the constitution.

The struggle for legislative supremacy over constitutional limitations should have ended a century ago. Formerly there was openly asserted a doctrine which, if sound, would give validity to legislation of this character against such constitutional limitations upon legislative power as we are considering, viz.: that constitutional limitations upon the exercise of legislative power are but admonitions to the legislative department without efficacy to annul enactments inconsistent with them. In 1803 that doctrine was completely overthrown by an authority which no one has challenged from that day to this, and upon reasoning so conclusive that it has evoked the universal approval and admiration of generations of students of constitutional law:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts,

is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the question of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding

the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be construed, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction."

Those who are charged with the exercise of judicial power in a constitutional government cannot too often advert to *Marbury v. Madison*, 1 Cranch, 137. The foregoing extended quotation from the opinion of Chief Justice Marshall in that case, is justified because of its demonstration that with respect to the ad-

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judication of questions of this character, that which is sometimes urged and regarded as mere compromise or concession is, in fact, a dereliction of duty. Since the soundness of that doctrine is universally admitted, its effect should not be evaded.

Judgments of the circuit court and of the court of common pleas reversed, and cause remanded to the court of common pleas with direction to sustain the demurrer.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

THE STATE OF OHIO EX REL. KNISELY ET AL. v. JONES
ET AL.

Persons succeeding defendants in office—Without authority to possess property of the office—Unless act of appointment is valid—Construction of legislative acts—Classification of cities repugnant to section 1 of article 13 of constitution—Act to organize and support police force of a city confers corporate power—Act of April 27, 1902, is void—Query as to section 6 of article 12 of constitution—Toledo police bill—Constitutional law.

1. Persons claiming to be the appointed successors of defendants in office, and to be entitled to the possession of property pertaining to such office, are without authority to make the relation in an action in mandamus to compel its delivery to them, unless the act under which they were appointed is valid.
2. All legislative acts relating to the same subject-matter should be construed together; and, since all the acts relating to the classification of municipalities and their reclassification, and the division of classes into grades, evince the legislative intention that municipalities having substantially the same conditions and characteristics shall not enter and remain in the same class, such acts are ineffectual to designate classified recipients of corporate power, and an act to confer such

66	453
66	506
66	453
68	611

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power upon a single city, by such classification, is repugnant to section 1 of article 13 of the constitution, which ordains that: "The general assembly shall pass no special act conferring corporate powers."

3. A legislative enactment to provide for the organization and support of a police force for a city, the expenses thereof to be paid by a tax levied upon all taxable property within such city, confers corporate powers.
4. The act of April 27, 1902, providing for the reorganization of the board of police commissioners of the city of Toledo, and the appointment of such commissioners by the governor, being a special act conferring corporate powers, is void.
5. Whether the provisions of the 6th section, of article 13, ordaining that: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws," is an exclusive classification of municipalities into cities and villages, we do not determine.
6. Nor do we determine whether the act referred to is void because violative of the principles of local government, or because conferring upon the governor powers which he is not competent to receive and exercise.

(Decided June 26, 1902.)

IN MANDAMUS.

In the petition it is alleged that on the 2nd day of May, 1902, the relators were, by the Honorable George K. Nash, governor, duly appointed and commissioned as city police commissioners of the city of Toledo, and that upon the day following they qualified and organized as required by law, their appointment and qualifications being pursuant to the provisions of an act passed by the general assembly on the 27th day of April, 1902, and to take effect upon its passage.

The petition further shows that the defendants were the duly constituted board of police commissioners of the city of Toledo prior to and upon the day of the passage of said act, holding office under

sections 1984 and 1985 of the Revised Statutes, which were repealed by the terms of the third section of the act of April 27, 1902.

The defendants are in the possession of the office, and of all the books, papers, and other property of the police department of Toledo. After their qualification as aforesaid, the relators demanded of the defendants the delivery of said books, papers and property, which the defendants refused, then claiming to be entitled to the custody thereof, and to the exercise of all the functions of said office, notwithstanding the passage of said act. The prayer of the petition is that a writ of mandamus may issue, commanding the defendants to deliver all of said property to the relators. The cause is submitted on demurrer to the petition.

The act of April 27th is entitled, "An act to amend, supplement, and repeal certain sections of subdivisions three, of chapter five, division five, title twelve, of the Revised Statutes of Ohio." In terms it amends section 1984 so as to provide as follows:

"All police powers and duties connected with and incident to the appointment, regulation and government of a police force in cities of the third grade of the first class, shall be vested in and exercised by a board of police commissioners, to be appointed by the governor. The governor shall appoint, as such commissioners, four citizens, electors of such cities, respectively, well known for their intelligence and integrity, not more than two of whom shall be of the same political party; two of whom of different political party faith and allegiance, shall be designated in their appointment to serve for two years, and the other two, also of different political party faith, shall be designated to serve for four years. And, thereafter, at the expiration of such term, and at each

period of two years, the governor shall appoint two members of said board to serve for a period of four years.

"For official misconduct, the governor may remove any of said commissioners; and all vacancies in said board by death, resignation or removal, shall be filled by the governor for the unexpired term; and all vacancies from whatever cause, shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. The commissioners, before entering upon their duties, shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Ohio; to obey the laws, and in all their acts and official actions and judgments, to aim only to secure and maintain an honest and efficient system of police, free from partisan dictation and control."

It also provides in detail for the qualification and appointment of officers of the police force, fixing their salaries, as well as the qualification and compensation of patrolmen. For the government of said police it embodies, by reference, numerous other sections of the statutes. By the second section, it provides for the delivery, by the commissioners then holding office, of all books, papers, property and appurtenances of the police department in their hands and under their control, to the police commissioners so appointed by the governor, this delivery to be made within five days after the appointment. The third section, in terms, repeals the former law upon the subject.

Mr. J. M. Sheets, attorney general, and *Messrs. Doyle & Lewis*, for relators.

There will be no inquiry here as to the wisdom of the law; none as to policy of making this an appoint-

ive instead of an elective office; none as to the comparative merits of the members of the old and new boards. There is only the question of the power of the general assembly to pass the act, and that only if the defendants in answer to the writ give that as the answer why they have not obeyed the alternative writ.

In the inception of the argument we ask attention to the recent case of *State v. Johnson*, 35 Fla., 2; 31 L. R. A., 357, to the effect that the governor's commission entitles relators to this remedy and that it can not be defeated by the claim that the defendant can not take advantage of a tenure of office *prima facie* ended and stand on that fact to claim to be in office *de facto* against the claims for the books and papers made by the holder of the *prima facie* title.

As to mandamus, see Sec. 6741, Rev. Stat.

Where the only cause of refusal to do an act which a valid law requires is doubt as to the constitutionality of the act existing in the mind of the person required to do the act, the excuse will not avail. *Ryan v. Hoffman*, 26 Ohio St., 109; *Citizens' Bank v. Wright*, 6 Ohio St., 318; *Railway Co. v. Clinton Co.*, 1 Ohio St., 77; *State v. Auditor Darke Co.*, 43 Ohio St., 311.

It is clearly the duty of the defendants specially enjoined by the law, resulting from their office, trust or station, to deliver to these relators the books, papers, property and appurtenances of the police department in their hands and under their control.

The proceeding in mandamus is a proper remedy. As it is a statutory proceeding in Ohio it depends entirely on the construction of the statute, and as that has not limited the right as it existed at common law, but extended it, the right is clear.

The general assembly has the right to pass legislation terminating and abolishing the office held by these defendants, and to provide for the appointment of their successors, and to make provision for the last official act of the defendants to be the surrender of the books, papers, property and appurtenances of the department to their successors. If the right of the relators is clear then the right to the possession of the insignia of office is clear and may be enforced by mandamus. Spelling, Extraordinary Remedies, Sec. 1508; *State v. Johnson*, 18 L. R. A., 410; 30 Fla., 433; *Thompson v. Holt*, 52 Ala., 491; *State v. Saxon*, 25 Fla., 792; *State v. Sherwood*, 15 Minn., 221; *Crowell v. Lambert*, 10 Minn., 369; *State v. Jaynes*, 19 Neb., 161; *People v. Kildoff*, 15 Ill., 492; *People v. Head*, 25 Ill., 325; *Stevens v. Carter*, 27 Oregon, 553; 31 L. R. A., 342; *State v. Dusman*, 39 N. J. L., 677; *People v. Hilliard*, 29 Ill., 413; *Lindsey v. Luckett*, 20 Tex., 516; *Metsker v. Neally*, 41 Kan., 122; *Harwood v. Marshall*, 9 Md., 83; affirmed, 10 Md., 451; *Stone v. Small*, 54 Vt., 498; *Lewis v. Whittle*, 77 Va., 415; *Fitzpatrick v. Kuby*, 81 Va., 467; *Bordgle v. Shallcross*, 6 W. Va., 562; *Strong, In re*, 20 Pick., 484; *Conlin v. Aldrich*, 98 Mass., 557.

The principle of the cases is this:

It is the duty of every public officer, at the expiration of his official relation, to surrender to his successor the property of the office which the law has committed to his custody, as in such property he has no individual right or interest, the title to it residing in the public, and of that he is merely custodian during his continuance in office; the duty is ministerial merely, no matter on what officer it devolves,

and at common law, its performance was enforceable by mandamus.

Mandamus is not excluded or avoided by the mere fact that there is some other remedy, the law being that there must be no plain and adequate remedy, in the ordinary course of the law. Mandamus is the only adequate remedy for preventing the confusion in government matters in such cases. *Thompson v. Holt*, 52 Ala., 491; *State v. Johnson*, 30 Fla., 433.

Mandamus is a writ to restore a party to an office from which he has been illegally excluded, and to cause its books, papers, etc., to be delivered to his possession. *Nelson v. Edwards*, 50 Tex., 389; *State v. Bruce*, 3 Brev., 264; 6 Am. Dec., 576.

An officer whose term has expired may be compelled by mandamus to surrender to his successors all records, books and papers pertaining to his office, where such officer, on demand, refuses to deliver the same. *Banton v. Wilson*, 4 Tex., 400; *Fasnacht v. Literary Assn.*, 99 Ind., 133; *Warner v. Myers*, 4 Ore., 72; *Driscoll v. Jones*, 1 So. Dak., 8; *American Railway Frog Co. v. Haven*, 101 Mass., 398; *State v. Trent*, 58 Mo., 571; *Keokuk v. Merriam*, 44 Iowa, 432; *Prince v. Skillin*, 71 Me., 366; *Goff v. Wilson*, 32 W. Va., 393; *Walter v. Belding*, 24 Vt., 658; *State v. Oates*, 68 Wis., 634; *People v. Allen*, 42 Barb., 203.

This is not a contest of an election, nor is it in the strict sense the trial of the title to the office. The relators come here under this law of April 17, 1902, the only law in force on the subject, with the commissions of the governor, and their qualifications thereunder admitted. The repeal of the law under which the defendants held their office terminates their official life.

In New Jersey it has been held that members of a public body holding over until their successors are elected and qualified are not officers *de facto* in such a sense that a mandamus should not be allowed against them. *State v. Freeholders of Hundon Co.*, 35 N. J. L., 269; *State v. Trenton Bd. Health*, 49 N. J. L., 349; *Baker, In re*, 11 How. Pr., 418; *North, In re, v. Cary*, 4 Thompson, etc., 357; *McGee v. State*, 103 Ind., 444; *Huffman v. Mills*, 39 Kan., 577; *Cunningham v. O'Connor*, 12 La., 397; *Harwood v. Marshall*, 9 Md., 83; *Cecil Co. Comrs. v. Banks*, 80 Md., 321; *State Building Loan Assn. v. Davis*, 50 Mo. App., 447, 450; *State v. Meeker*, 19 Neb., 444.

Quo warranto proceedings may determine finally the right to the office, but even then mandamus might have to be resorted to to get the books, papers and property. *Driscoll v. Jones*, 1 So. Dak., 8.

Where the relators show their appointment, commission and qualification under the act, that will entitle them to the books, etc. See cases above cited. *People v. Stevens*, 5 Hill, 616; *People v. Miller*, 16 Mich., 56; *State v. Dodson*, 21 Neb., 218; *Foley, In re*, 8 Miss., 196; *Cameron v. Parker*, 38 Pac. Rep., 14; *Lapointe (Supervisors of) v. O'Malley*, 46 Wis., 35; *State v. Vail*, 53 Mo., 97.

To the effect that the commission of the relators gives them the office *prima facie* and entitles them as against the old incumbents to the books and papers, we also cite and ask attention to *Wenner v. Smith*, 4 Utah, 238; *Plowman v. Thornton*, 52 Ala., 559; *Thompson v. Holt*, 52 Ala., 491; *Conklin v. Cunningham*, 38 Pac. Rep., 170.

Where the duty is due from a public officer and to be performed at a particular time, the law imposing the duty is a continual demand for its performance,

and the courts have gone so far in enforcing this duty as to put defendants in default without demand, the default being in the nonperformance.

In this case the law does not even require a demand for these books and papers, but makes it the affirmative duty of defendants to deliver them. Demand, however, was made. Spelling, Extra. Rem., Sec. 1381, page 1192; *State v. County Judge*, 7 Ia., 186; *State v. Jacksonville*, 22 Fla., 21.

There is nothing here but the statute.

The defendants held their office under Secs. 1984, 1985, Rev. Stat. Those sections are repealed and on the 27th of April, 1902, ceased to exist as completely as if they never did exist. The defendants do not claim any other title to or foundation for their office. They are out of office. They can never be *de jure* officers.

The relators claim title by virtue of the act of April 17, 1902, being the duly appointed and commissioned officers under that act.

There is no other act or law in force.

There is no one else claiming title under that law. Every presumption is in favor of the relators, and *prima facie* they are the officers; they are the officers *de jure*, and are also the officers *de facto*. They are exercising the duties and functions of the office under their commissions.

There is no room here for the rule that the office is occupied *de facto* or is full *de facto* by title that may ripen *de jure* as against the relators, or that the writ is asked by a relator clearly out *de facto* to oust an incumbent who is clearly in. The relators are in *de facto* and *de jure* and want the insignia of the office from defendants whose terms have ceased.

We stand on this act of April 17th and assert its constitutionality and validity. *State v. Bailey*, 37 Ohio St., 98; *State v. Covington*, 29 Ohio St., 102; *State v. Baughman*, 38 Ohio St., 455; *State v. Hudson*, 44 Ohio St., 137; *State v. Smith*, 44 Ohio St., 348.

Cincinnati v. Covington, *supra*, was also expressly affirmed in *State v. Shearer*, 46 Ohio St., 275, upholding a special school act; and in *McGill v. State*, 34 Ohio St., 228, upholding a special jury law for Cleveland, the same principle was applied.

It has been cited and approved in the following cases: *State v. Mitchell*, 31 Ohio St., 592; *Bloom v. Xenia*, 32 Ohio St., 461; *State v. Hoffman*, 35 Ohio St., 435; *Railroad Co. v. Walrath*, 38 Ohio St., 461; *State v. Constantine*, 42 Ohio St., 437; *State v. Pugh*, 43 Ohio St., 98; *State v. Kieseewetter*, 45 Ohio St., 254; *Weil v. State*, 46 Ohio St., 450; *State v. Jacobi*, 52 Ohio St., 66; *Mason v. State*, 58 Ohio St., 30.

The author of the act has wisely avoided the only danger that might arise in case the Supreme Court ignored the doctrine of *stare decisis* and concluded to hold the classification by the present division into grades and classes of municipalities, to be an evasion of the constitution, and that special laws granting *corporate power* could not be passed and enforced.

It has been asserted that this act can never apply to any city but Toledo. That, we assert, is not the effect of the act, but is a justifiable classification, if there is any such, and unless this court intends to go to the full length, that classification cannot be justified at all upon the plan of grading cities, under the authorities upon the subject this act must be sustained.

This act gives to this board no authority to contract debts, levy taxes, make laws, issue bonds, appropriate

lands, or private property. It simply vests in the board the powers and duties connected with appointment and regulation of the police force of cities of the third grade of the first class.

There is not a sentence or word in the act that limits it, in its operation to any particular city, but it is peculiarly free from any such limitation.

Such a construction should be given to a statute, when reasonable, as will uphold the statute, rather than one which will defeat it. *Burt v. Rattle*, 31 Ohio St., 116; *State v. Buckley*, 60 Ohio St., 296; *Doyle v. Doyle*, 50 Ohio St., 330.

We are not asking for any extension of the doctrine of classification. We are not even pleading for any adherence to that doctrine where it applies to subjects of eminent domain, the levy of taxes, the enacting of penal laws or ordinances, the incurring of debt by issuing bonds, or otherwise, not even to the exercise of any corporate power whatever, as that term has been defined by the able men of the past who have honored the bench by their membership of this court. We still say that this law can be sustained without reference to its support on the doctrine of classification, but we say also that, upon both reason and authority, this classification is proper. There is no reason why the police board of every city in the state should consist of the same number, or be selected the same way. No such reason has been discovered in the half century during which we have lived under this constitution.

There is force in the doctrine known as "Contemporaneous and practical construction of constitutions and statutes."

To upset this law is to render void the police laws, in force and valid, by the express decisions of this

court, in an unbroken line of cases in Cincinnati, Dayton, Columbus, Cleveland, Toledo, Springfield, Xenia, and other cities, leaving their police department in a condition of chaos, and without government.

The effect of a practical construction, and long acquiescence by the people from whom emanated the constitution, and the force of the argument *ab inconvenienti* will be found in the decisions of this court in *Work v. Corrington*, 34 Ohio St., 64; *State v. Vanderbilt*, 37 Ohio St., 590; *Brown v. Farran*, 3 Ohio, 140, wherein the court quotes from Lord Coke, where this rule is applied even to Magna Charta. *Chesnut v. Shane*, 16 Ohio, 599; *Clark v. Board of Education*, 44 Ohio St., 595; *Dutoit v. Doyle*, 16 Ohio St., 400; *Moore v. Vance*, 1 Ohio, 1; *Biggerstaff v. Loveland*, 8 Ohio, 44; *Craig v. Fox*, 16 Ohio, 563; *Bank v. Swayne*, 8 Ohio, 257. See also *McPherson v. Blacker*, 146 U. S., 1-13; Black Interp. Laws, Sec. 20, pp. 31, 32.

Now, an unbroken line of decisions has sustained this classification, if we rely wholly on classification. But an unbroken line of decisions sustains this law, both upon and independently of the doctrine of classification.

This interpretation of the constitution commences with *Cass v. Dillon*, 2 Ohio St., 607, and followed by *Kelley v. State*, 6 Ohio St., 269; *State v. Kendle*, 52 Ohio St., 346; *State v. Cappeller*, 39 Ohio St., 207; *Cricket v. State*, 18 Ohio St., 9; *Hart v. Murray*, 48 Ohio St., 605; *Norton v. Trustees*, 4 C. D., 422; 8 C. C. R., 335; *State v. Turnpike Co.*, 37 Ohio St., 481; *Neil v. Trustees*, 31 Ohio St., 15; *State v. Davis*, 23 Ohio St., 434; *Metcalf v. State*, 49 Ohio St., 586; *Marmet v. State*, 45 Ohio St.,

63; *State v. Brewster*, 39 Ohio St., 653; *State v. Wall*, 47 Ohio St., 499; *State v. Hawkins*, 44 Ohio St., 98; *State v. Toledo*, 48 Ohio-St., 112; *Scheer v. Cincinnati*, 9 Re., 477; 14 Bull., 87; affirmed without report by the court, 15 Bull., 66, and many other cases.

Is there anything left of the above doctrines? And to what extent, if at all, may reliance be placed on half a century's continuous acquiescence by the people, including the executive, legislative and judicial servants of the people.

We do not believe in sham classification. We do not believe that classification which on one subject would be proper, is necessarily proper on all subjects.

We do not believe in classifying cities in respect to the exercise of corporate power by any such arbitrary rule as the population at the last census, or having a navigable river in it, or which is so limited as that it can apply, at present and in the future, to but one city.

In so far as we have, if we have, departed from the "landmarks our fathers have set for us," we believe in returning to them, but these mileposts were not located at once. They were established one mile at a time, and we are in danger of losing our way entirely in an effort to commence where they commenced and to rebuild them.

Caring little, in this discussion, about the subject of classification generally, we only call attention to the fact that in the act of 1852, enacted immediately after the adoption of the constitution, Curwen's Statutes, page 1847, Vol. 3, Secs. 40, 41 and 42, Municipal Corporations, were divided into classes, viz.: Cities of the first and cities of the second class; incorporated villages and incorporated villages for special pur-

poses. All cities of 20,000 inhabitants and upwards, at last census, were first class, and all others second class, and it provided for future advancements.

But we are more especially concerned now with the police board as a specialty. *State v. Shearer*, 46 Ohio St., 275, a case presenting a forcible way of putting into activity the doctrine of contemporaneous and practical construction, adverted to elsewhere. It is equally applicable to the question under consideration.

We do not go back of the present constitution.

In 1859, March 14, Curwen's Statutes, Vol. 4, p. 3198, the general assembly created a board of police commissioners for cities of the first class, containing a population of 80,000 inhabitants to consist of four persons to be selected by the mayor, police judge and city auditor, and vested in that board the same powers as have since, as a rule, been vested in such boards. That act has been the model from which all subsequent ones have been framed.

From that time to this, while perhaps not as many as 140 laws have been passed of similar kind, the number is great enough to make this contemporaneous construction a practical, consistent and long acquiesced in construction, that invokes the doctrine above referred to.

From the adoption of the first municipal code, under the constitution, to this time, in all of its various amendments, among the powers granted to the municipal corporation was the one "to organize and maintain a police department," and equally during all this time the general assembly has reserved to itself, and exercised, the right and power of determining how and in what manner *the governing body* shall be selected and of what number it shall consist, upon the

principle announced in *State v. Davis*, 23 Ohio St., 434; and others.

What has demonstrated that Judges White, Welch, Gilmore, McIlvaine, Boynton, Okey, Johnson, Longworth, Owen, Follett, Dickman, Spear, Williams and Minshall, were all mistaken when they decided as they did in *State v. Covington*, 29 Ohio St., 102; *State v. Bailey*, 37 Ohio St., 98; *State v. Baughman*, 38 Ohio St., 455, 456; *State v. Hudson*, 44 Ohio St., 137; *State v. Smith*, 44 Ohio St., 348; *State v. Shearer*, 46 Ohio St., 275.

All unreversed cases, and all cited by this court with approval in the two dozen cases cited in our briefs, *that this police law was a constitutional and valid enactment*. That it was a proper subject for a local law, was not of a general nature, and did not confer corporate power.

So corporate power has no longer anything to do with corporations. Whatever is corporate power if granted to or exercised by a corporation is corporate power if granted to or exercised by individuals, and to reach this definition of corporate this court must, upon a definition of this kind find that the court in the past was mistaken in all that it said in *State v. Davis*, 23 Ohio St., 434; *Neil v. Board of Trustees*, 31 Ohio St., 15; *State v. Pugh*, 43 Ohio St., 98; *State v. Powers*, 38 Ohio St., 54; *State v. Shearer*, 64 Ohio St., 275, and the many other cases cited. These cases are not only to be reversed upon the exact questions involved, but they are to be reversed because they define corporate power, to be confined to powers conferred upon a corporation.

But that is not all. All police power vested in the state is corporate power "of the highest character"

no matter upon whom it is conferred, corporation, board or individual.

So that the governor, the sheriffs, the constables are exercising corporate power. If the general assembly in whom is vested all legislative power confers any police power upon any agency or person, whom it may in due form of law select, it is corporate power. If the general assembly should vest any police power in any person or board it would be corporate power, and for the reason that "it savors of sovereign power" by which is meant the powers of the state.

So now individuals executing contracts, notes, bonds, buying and selling property, and doing those things that would be corporate if done by a corporation, are corporate just the same, and the state, in the performance of its governmental powers and duties, which it can only do through agencies, is, in the creation of those agencies and defining their duties, creating them corporations and conferring corporate power on them, not by choice but by the compulsion of the constitution. So when the state levies a tax; when the general assembly passes laws; when the governor calls out the militia, they are doing it in a corporate capacity and are exercising corporate powers.

But the difficulty is that in the practical administration of the law these police boards, boards of health, waterworks boards, school boards which are purely administrative or managing agents or agencies have always been selected and appointed or elected according to the legislative judgment.

And counsel find that, upon every proposition they assert, they ask you to overrule some case or some number of cases of this court, and the argument "in a circle" seems to be an effort to break this complete circle of decisions, upon every point herein involved."

Take the language of this court in the *State v. Powers*, 38 Ohio St., 54, in the syllabus, and the language in the opinion of Judge McIlvaine, as a sample. It must not only be held to be wrong, but foolishly and inexcusably wrong, if these new definitions insisted upon here and to be adopted, so on this question, you are asked to overrule, independently now of classification. *State v. Judges*, 21 Ohio St., 1; *McGill v. State*, 34 Ohio St., 228; *State v. Cincinnati*, 52 Ohio St., 419; *Senior v. Ratterman*, 44 Ohio St., 661, and numerous others including cited police board, school board and board of control cases so often referred to herein.

The power was vested in the old board, originally appointed by the governor and is now vested in the new board to exactly the same extent. No greater, no less, the only difference being that it requires better qualifications for its members and secures better services for the state and the people. It is an effort to wipe out the shame that has come upon the police, and the inefficiency that is the result of dirty municipal politics in this department.

Messrs. Brown, Geddes & Bodman, and *Mr. Clarence Brown*, attorneys for defendant.

The decision of this question depends upon the determination of what are "corporate powers." It is insisted by counsel for relators, on the authority of *State v. Corington*, 29 Ohio St., 102, that "corporate powers" means only *powers conferred upon a corporation*, and that special privileges, such as are usually exercised by corporations, and by them exclusively, may be conferred upon individuals or an unincorporated board (even though it be an agency of a municipal corporation), without contravening this consti-

tutional provision, *for the sole reason that the donee of the powers is not a corporation.* It is insisted that the same powers may be conferred upon individuals, which could not be conferred upon those persons if they were incorporated. For example, while it would not be competent for the legislature, by special act, to authorize the city of Toledo to exercise different corporate powers from other cities of the same grade and class, still the same powers may be conferred upon individuals, or an unincorporated board—an agency of the city—because the constitution merely provides that such powers must not be conferred by special act upon *corporations.*

The error is plain. Article 13, Sec. 1 of the constitution does not provide that corporate powers shall not be conferred by special act *upon corporations alone*, it provides that *corporate powers shall not be conferred by special act*—upon any person, whether natural or artificial. The powers which the legislature is forbidden to confer in this manner are those special privileges which are ordinarily not enjoyed by the individual citizen, and which, if conferred at all, must be conferred by general laws having uniform operation throughout the state.

The history of this provision and the reasons for its insertion in the constitution are well known. Prior to 1851, the number of special acts passed by the legislature in each session was enormous. During the session of 1838-9, 600 such acts were passed conferring special privileges not enjoyed by the citizens at large, although in the same situation and as much entitled thereto as the persons to whom these privileges were granted. 1 Debates, p. 347.

The era immediately preceding the adoption of the present constitution was well known as the "era of

log-rolling." Members of the legislature from different sections of the state presented special acts conferring special powers, privileges and immunities upon their constituents. To secure the votes of other legislators, promises were given to vote for special acts introduced by them. It was no less obnoxious that the special powers were conferred upon individuals or unincorporated societies, associations or boards, instead of upon companies already incorporated. The objection raised throughout the state was that special privileges were granted to some, which were denied to others, and that favoritism was thus extended not only to corporations, but to private citizens, associations and societies as well. The objection was to the *character of the privileges* conferred, and it was insisted that if special privileges were to be conferred, such as were not possessed by the natural citizen, those privileges should be possessed and enjoyed by all and not by some at the expense of others. 1 Debates, 351.

These privileges referred to in the Debates, and at which this constitutional provision was aimed, were most frequently conferred upon corporations. They were privileges or powers which the individual members of society did not possess, and from the fact that they were usually conferred upon, and exercised by, corporations, they came to be referred to as "corporate powers."

The constitution is intended not only to provide against the conferring of special privileges upon corporations, but upon all members of the body politic. If it had been intended to forbid the conferring, by special act, of special privileges upon corporations alone, it was unnecessary to make the separate provisions of Secs. 1 and 2 of Article 13.

The term "corporate powers" has reference to those powers which ordinarily and usually belong to, and are exercised by, a corporation. As before stated, they are powers which do not belong to the individual, nor to an association of individuals; such as, for example, the power of succession, and others which readily suggest themselves. These powers and privileges derive their name "corporate powers" from the fact that they are usually conferred upon incorporated bodies. But historically, these privileges and powers existed and were exercised before the incorporation of societies was known and before the term "corporation" was ever used; and it is significant that, at the present time, one of the tests of corporate existence is the possession of these special privileges or powers which are ordinarily or usually exercised by corporations. Thus, the constitutions of many states define a corporation to be any association having any of the powers or privileges of corporations not possessed by individuals or partnerships. Constitution of New York, Art. 8, Sec. 3; constitution of Pennsylvania, Art. 16, Sec. 13; constitution of Michigan, Art. 15, Sec. 11; constitution of Minnesota, Art. 10, Sec. 1; constitution of Kansas, Art. 12, Sec. 6; constitution of North Carolina, Art. 8, Sec. 3; constitution of California, Art. 12, Sec. 4; constitution of Alabama, Art. 14, Sec. 13; constitution of Missouri, Art. 12, Sec. 11.

A corporation sole consisted of a single person deemed a body politic and corporate because possessing some legal capacities and advantages, and especially that of perpetuity, which as a natural person he could not have. 2 Kent Comm., 273.

A bishop of the Church of England was deemed a corporation sole, not merely because of the capacity

of legal perpetuity, but also because of the exercise by him of other corporate powers. For example, the bishops of Durham, in the exercise of corporate powers, granted charters of incorporation to the city of Durham in 1565, 1602 and 1780, and the last was the charter in operation up to the passing of the municipal corporations act (1837). 6 Encyc. Brit., 433, title "Corporations." In the United States ministers seized of parsonage lands in rights of the parish have been regarded as corporations sole. *Brunswick v. Dunning*, 7 Mass., 445; *Weston v. Hunt*, 2 Mass., 500; *Archbishop v. Shipman*, 79 Cal., 288. This has usually been not by virtue of any statute expressly creating them such corporations, but because there have been conferred upon them corporate powers.

So the king was deemed a corporation and the same quality has been in this country ascribed to the governor of a state. 1 Thomp. Corp., Sec. 8.

The grant of corporate powers to one person and his associates virtually confers on him alone the right to exercise all the corporate powers thereby granted. Angell & Ames Corp., Secs. 28, 78; 1 Thompson Corp., Sec. 8; Dillon Munic. Corp. (4 ed.), Secs. 42, 43.

Thus it appears that "corporate powers" are such, although conferred upon unincorporated individuals, and, indeed, that corporations may be the result of conferring corporate powers upon individuals.

There exists both in this country and in England what are known as "corporations by prescription;" that is, although there never was in fact a charter, or incorporating act, nevertheless, from the long continued exercise of corporate powers, a charter will be presumed to have been granted. Beach Pub. Corp., Secs. 62, 76.

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A corporation sole could not exist if corporate powers could only be bestowed upon a corporate entity. An individual is a corporation sole because he possesses the powers, corporate in their nature.

Special or corporate privileges were originally granted in England by the king by special charter; and later, in the same way, by both king and parliament.

In America, "this authority is exercised by the state, upon which descended this power along with the other prerogatives vested in the crown upon the emancipation from British dominion." Beach Pub. Corp., Secs. 31, 39.

The claim that powers conferred are not "corporate powers" unless conferred upon a corporation is not sustained by the recent decisions of this court. Counsel for relators claim that such powers as are conferred by this act are not conferred upon the municipality but upon an unincorporated board.

A similar claim was made in the case of *Commissioners v. State*, 50 Ohio St., 653, where an act was reviewed which authorized the councils of the villages of Norwood and Pleasant Ridge to nominate and recommend to the commissioners two freeholders to act as trustees in making a certain contemplated improvement on a highway. It was claimed that this law contravened Sec. 1, Art 13 of the constitution. In answer thereto it was urged that there was no attempt to confer power upon the municipalities, but that if power was conferred at all, it was conferred upon the village councils.

It was further claimed in that case that even if the power was conferred upon the corporation, still it was not "corporate power," because it was not to be exercised with respect to the business of government

of affairs of the two corporations, but that the contemplated improvement was an "outside and independent matter."

It is to be noted that the court did not apply the test contended for by relators in this case, *i. e.*, whether the powers were conferred directly upon a corporation *eo nomine*. On the contrary, the court held that, although powers conferred directly upon a corporation would be presumed to be corporate powers, still that presumption could be rebutted. And indeed, in this case, the court determined the question *by an examination of the character of the powers conferred*. The test applied in this case was *whether the powers related to the business and affairs of the municipality*; and it appearing that they did, they were held to be corporate powers.

It would scarcely be contended that the powers to be exercised by the board of police commissioners of the city of Toledo, under the act of 1902, do not relate to the business and affairs of the city of Toledo. They in fact concern many of the most important affairs of the city. *State v. Cincinnati*, 23 Ohio St., 445; 1 Dillon Munic. Corp., Sec. 21.

An act, passed March 13, 1890, created for cities of the first grade of the first class "A board of public improvements" and abolished the board of public affairs; the duties of the latter board being conferred upon the new board, which was declared to be "in all respects the successors of the old board." 87 O. L., 62. Under this law, the relators in *State v. Smith*, 48 Ohio St., 211, were appointed members of such board by the governor, to whom the power to appoint was given by the statute. Afterwards, this board was abolished by an act passed October 24, 1890, and a new one, called "A board of city affairs" was

created for cities of the same grade and class as the former. It was made to consist of four members appointed by the mayor. It was claimed that this was a special act conferring corporate powers. It was held to be a special act because of a provision that the bonds of the appointees should be approved by the judges of the superior court. Cincinnati being the only city having such court, was plainly designated by the act.

It was also held that corporate powers were conferred.

With regard to this case, the following points should be noted: (1) The corporate powers conferred were not conferred directly upon the corporation by that name, but upon an unincorporated board; (2) the corporate power, which was said to be conferred, was *the power to have a certain board as part of the municipal government*. *State v. Powers*, 38 Ohio St., 54; *Eckstein v. Board of Education*, 4 Circ. Dec., 149; 10 C. C. R., 480; *Clegg v. School District*, 8 Neb., 178.

The Michigan legislature passed an act to establish a board of public works in and for the city of Detroit, conferring certain powers upon such board, and itself appointing the first members of such board as permanent officers for full terms. It was insisted that these powers could be conferred only upon the city corporation, to be exercised by the common council, and that no part of them could be conferred upon any board of the city. *People v. Hurlbut*, 24 Mich., 44.

Powers conferred upon the common council, or the police board, of the city of Toledo, are conferred upon the city; for, since the city acts only through its agencies (*i. e.*, the council, the police board, etc.), any act which authorizes the agencies of the city to

exercise powers, authorizes the city to exercise the same powers.

Surely an act which attempts to confer special powers upon an individual is equally as offensive as one which confers it upon a corporation already existing. For example, the legislature might confer the power of eminent domain upon hotel companies. According to the argument of counsel for the relators, if the legislature undertook to confer upon the Toledo Hotel Company, for example, the power of eminent domain, such act would be unconstitutional because it would be a special act conferring powers upon a corporation. Yet, if the legislature conferred the same power of eminent domain upon John Smith, the president of the Toledo Hotel Company, such act would not be a special act conferring corporate powers, for the reason that the grantee was not a corporation. If the act in question would be unconstitutional in case the powers conferred were conferred upon the municipal corporation of the city of Toledo, for a stronger reason would the act be unconstitutional if the same powers were conferred upon an individual member of that corporation for the benefit of the corporation? Surely it cannot be claimed that the legislature may confer upon Smith, a citizen of Toledo, the power of taxation and the power to expend public funds for the police department;—upon Jones the power of taxation and the expenditure of public funds for the fire department, and upon another the power to maintain public cemeteries, water-works and the like, all for the benefit of the city of Toledo, and yet may not confer that same power by special act upon all the inhabitants of the city of Toledo collectively either in the name of the corporation itself or of the common council as its representative.

If the act be deemed neither to confer corporate powers nor to organize (in part) a city, it conflicts with Sec. 26 of Art. 2 of the constitution.

State police supervision and control is a subject of a general nature and laws regulating the same must have a uniform operation throughout the state.

The decision in *State v. Covington*, 29 Ohio St., 102, appears to have been contra. But that decision appears to have rested upon the theory that a law is not of a general nature because its operation is limited. That theory is reached only by arguing in a circle. *State v. Bargas*, 53 Ohio St., 94; and would make evasion so easy as to accomplish practical nullification. *Gaylord v. Hubbard*, 56 Ohio St., 25.

The act must be deemed either:

(1) A partial reorganization of a branch of municipal government the creation of a municipal board; a violation of Sec. 1 of Art. 13, in that it confers corporate powers upon the municipality, upon the board thereby sought to be created, and upon the state executive—the power, incident to and inherent in the municipality, and therefore a corporate power, to appoint members of a municipal board, a local governmental agency; or

(2) A law of a general nature, regulating the appointment, organization, control and government of the police. *Cincinnati v. Steinkamp*, 54 Ohio St., 284.

The subject of the enforcement of the police regulations of a community which are designed to protect life and limb, not only from the danger of fire, but from other dangers as well, is no less general than the subjects of protecting life and limb from fire alone.

In *State v. Ketter*, 65 Ohio St., 558, it was held that an act for the protection of life and property in cities of the first grade of the first class (requiring and regulating licenses to stationary engineers) was unconstitutional, on the authority of *Cincinnati v. Steinkamp*, *supra*.

The act violates the principle of local self-government. This principle is always understood to underlie the constitution. *State v. Commissioners*, 54 Ohio St., 333; *Cooley Const. Limit.*, 47; *People v. Hurlbut*, 24 Mich., 44; 1 Dillon, *Municipal Corporations*, Sec. 21.

The framers of the constitution purposed, by Secs. 1, 2 and 6, Art. 13, to provide for the local self-government of municipalities.

When the sections reported by the committee (1 Debates, 260) were considered by the convention, in committee of the whole, determined efforts were made to strike out (*Ib.* 340) and to modify in various ways. It was vainly sought to amend (1) by inserting the words "except for municipal purposes" (p. 346), (2) by inserting "except for municipal purposes, or where the objects cannot, in the opinion of the general assembly, be attained under general laws" (p. 355)—this being substantially the form used in the constitution of New York (p. 352) and followed by that of Wisconsin (p. 343); (3) by adding "except for such municipal and charitable purposes as, in the opinion of the general assembly, cannot be attained by general law" (p. 362); and (4) by adding "Provided that the legislature shall pass no special act conferring corporate privileges, except for municipal purposes, and where, in their judgment, the objects can be better attained than under a general law" (p. 363).

The exceptions in the constitutions of New York and Wisconsin have resulted in constant tinkering by the state legislatures with city governments.

The evil results in New York are summarized by the report of the commission of 1876 appointed "to devise a plan for the government of cities in the state of New York" which commission, whereof William M. Evarts was chairman, "included some of the ablest men in the state, and its report presented March 6, 1877, may be said to have become classical."

The commission suggested among the causes of the prevailing evils, the assumption by the legislature of direct control of local affairs.

The Debates show that the members of the Ohio convention realized and sought to guard against these evils. The constitutional inhibition against special acts conferring corporate powers, and requirements for the organization of cities under general laws, and that all laws of a general nature shall have a uniform operation throughout the state, leave no room for a special act for the local government of a particular municipality.

Moreover that the rule of *stare decisis* does not require this court to follow any prior upholding of a special act conferring corporate power is conclusively demonstrated in *State v. Pugh*, 43 Ohio St., 123.

Mr. Brand Whitlock, for defendants, cited and commented upon the following authorities:

State v. Covington, 29 Ohio St., 102; *Kelley v. State*, 6 Ohio St., 269; *McGill v. State*, 34 Ohio St., 228; *State v. Powers*, 38 Ohio St., 62; *Cooley Const. Lim.*, 104; *Dillon Munic. Corp.*, 17; *State v. Baughman*, 38 Ohio St., 455; *State v. Shearer*,

46 Ohio St., 275; *Commissioners v. Rosche Bros.*, 50 Ohio St., 103; *State v. Judges*, 21 Ohio St., 1; *State v. Mitchell*, 31 Ohio St., 592; *State v. Brewster*, 39 Ohio St., 653; *State v. Pugh*, 43 Ohio St., 98; *State v. Hawkins*, 44 Ohio St., 98; *State v. Hudson*, 44 Ohio St., 137; *Marmet v. State*, 45 Ohio St., 63; *State v. Wall*, 47 Ohio St., 499; *State v. Toledo*, 48 Ohio St., 112; *State v. Cincinnati*, 52 Ohio St., 419; *State v. Nelson*, 52 Ohio St., 88; *State v. Baker*, 55 Ohio St., 1, 8; *Kenton v. State*, 52 Ohio St., 59; *State v. Anderson*, 44 Ohio St., 247; *Atkinson v. Railroad Co.*, 15 Ohio St., 21; *State v. Smith*, 48 Ohio St., 211; 7 Am. & Eng. Ency. Law (2 ed.), 618; *Warner v. Beers*, 23 Wend. (N. Y.), 103; *Insurance Co. v. New York*, 134 U. S., 594, 599; *Brady v. Moulton*, 61 Minn., 185; 7 Am. & Eng. Ency. Law (2 ed.), 699; Stubbs, Const. Hist. (2 ed.), Sec. 810; *School Dist. v. Insurance Co.*, 103 U. S., 707; *Commissioners v. State*, 50 Ohio St., 653, *State v. Cincinnati*, 20 Ohio St., 18; *State v. Cincinnati*, 23 Ohio St., 455; *State v. Constantine*, 42 Ohio St., 437; *Devine v. Comm. of Cook*, 84 Ill., 560; 2 May's Const. Hist., 465; 7 Davis. Pol. Science Quarterly, 273; *Thomas v. Ashland*, 12 Ohio St., 124; *Bronson v. Oberlin*, 41 Ohio St., 476; *Bonebrake v. Wall*, 11 Re., 38; 24 W. L. B., 175; *Costello v. Wyoming*, 49 Ohio St., 202; *State v. Bargus*, 53 Ohio St., 94; *Railway Co. v. Martin*, 53 Ohio St., 386; *Merrill v. Toledo*, 3 Circ. Dec., 524; 6 C. C. R., 430; *Carr v. West Carrollton*, 4 Circ. Dec., 303; 8 C. C. R., 1; *Herrman v. Cincinnati*, 6 Circ. Dec., 151; 9 C. C. R., 357; *Simpkinson v. Board Public Works*, 9 Re., 453; 13 W. L. B., 614; *Hixson v. Burson*, 54 Ohio St., 470; *State v. Cowles*, 64 Ohio St., 162;

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People v. Hurlbut, 24 Mich., 44; *People v. Common Council*, 28 Mich., 228; 1 Dill. Mun. Corp., Sec. 67; *People v. Draper*, 15 N. Y., 532; *Darlington v. New York*, 31 N. Y., 164; *State v. Seymour*, 35 N. J. L., 47; *State v. Valle*, 41 Mo., 29; *Daley v. St. Paul*, 7 Minn., 390; *State v. Smith*, 44 Ohio St., 348; M. de Tocqueville, *Democracy in America*, Chap. V.

SHAUCK, J. In the opinion of counsel for the relators the constitutional validity of the act of April 27, 1902, is not involved in the present inquiry. Their view of the subject is that this act repeals the statutory authority under which the defendants held the office of police commissioners, and that, the relators are therefore the only persons who, under an existing statute, claim to hold the office, and to be entitled to the possession and custody of the property which appertains to it. For two conclusive and independent reasons we regard this view as defective, and the conclusion to which it leads as unsound.

This act, and the sections for whose repeal it provides, relate to the police organization of the city of Toledo. Such organization is not otherwise provided for. Owing to the relation and the subject-matter of the statutes, we cannot suppose that the general assembly would have enacted the section repealing the law under which the defendants claim and hold office, but for the belief that the act under which the relators were to succeed them would be operative. That supposition would impute to the general assembly an intention to leave the city without such organization. That is forbidden by the nature of the subject, and by the universally recognized necessity for such an organization in all the cities of the state. Applying to the case a doctrine with which the law-

yers of the state are quite familiar, the repealing section of the present act is inoperative unless its provisions for reorganization of the board are valid. The system provided by the former legislation being still in full operation, it should continue, unless, by a valid act, a system to succeed it has been provided.

It also seems quite clear that the title of the relators, and their right to the possession of the property appertaining to the office of police commissioners, depends upon the constitutional validity of the act of April 27, 1902. If that act is invalid, the relators are but private citizens, wholly without authority to demand or receive such property, and without authority to make the present relation. Even if the defendants have ceased to hold office as police commissioners, there is no duty enjoined upon them by law to deliver the property in question to persons who are without official rights and duties with respect to it.

The validity of the act is denied because, in the view of counsel for the defendants, it is a special act conferring corporate powers, in violation of the first section of the thirteenth article of the constitution, ordaining that: "The general assembly shall pass no special act conferring corporate powers." Confessedly, if the act is general, it is not within the inhibition of this section. The act is said to be general and not special, because it provides for "the appointment, regulation, and government of a police force in cities of the third grade of the first class." That it affects no municipality in the state except Toledo is admitted. But the fact is said to be immaterial, because of the classification of cities by the general assembly, and the doctrine formerly applied by the courts to such classification.

That there has long been classification of the municipalities of the state is true. It is also true that while most of the acts conferring corporate powers upon separate municipalities by a classified description, instead of by name, have been passed without contest as to their validity, such classification was reluctantly held by this court to be permissible. But attention to the original classification, and to the doctrine upon which it was sustained, must lead to the conclusion that the doctrine does not sustain the classification involved in the present case, and in *State ex rel. v. Beacom et al.*, presently to be decided. Originally, all the municipal corporations of the state were comprehended within the following classification: "Cities of the first, and cities of the second class; incorporated villages, and incorporated villages for special purposes." The basis of the classification was unqualifiedly fixed by the statute which provided that all cities which then had, or might thereafter have, a population exceeding twenty thousand, should be cities of the first class; and, by like terms, municipalities having, or attaining to, a population of more than five thousand, but not exceeding twenty thousand, should be cities of the second class. By an unvarying rule the characteristic of population was made the basis of the classification, and it was made inevitable that every city attaining a population of twenty thousand should advance, and become a city of the first class; and, that every village attaining a population of five thousand should become a city of the second class. Against the validity of acts conferring corporate powers by such classification, it was urged that the validity of an act must be determined by its practical operation, and not by its form; and, that such acts, though general

in form, were special in operation. The answer to that objection stated the sum of the judicial doctrine of classification. One may state that answer as strongly as his abilities will permit, without giving it his approval. The answer was that the classification was to be permanent since it was to be presumed that the general assembly intended obedience to the constitution, that the requirement of the constitution was not that an act granting corporate power should immediately operate in all cities, but that there was a sufficient compliance in the provisions of the statute for the imperative advancement of every municipality when it should have the prescribed characteristic of population, and thus every municipality of the class described in the statute by which power was conferred, or of a lower class, might come within its operation. Two things were true and they were of the essence of the doctrine. Advancement was by a rule of unvarying application, and every municipality might become subject to the operation of every statute conferring corporate power upon its own or a higher class.

The number of classes into which successive acts have since divided the municipalities of the state to make them recipients of corporate power cannot be ascertained upon any inquiry that is practicable. Sections 1546 to 1552 of the Revised Statutes, relate exclusively to the subject of classification. The first of these sections now provides that cities of the first class shall be of three grades, and cities of the second class shall be of eight grades. In the present view grades of classes are but added classes. In these eleven classes the eleven principal cities of the state are isolated, so that an act conferring corporate power upon one of them by classified description, confers

it upon no other. They have been isolated under the guise of classification, as their growth promised realization of the belief which was the foundation of the judicial doctrine of classification, viz.: that their advancement under the unvarying rule of population, would give a wider operation to acts conferring corporate powers. An impediment to the more general operation of laws conferring corporate powers on cities of the first class is found in section 1546: "Cities of the second class, which hereafter become cities of the first class, shall constitute the fourth grade of the latter class." We are not aware that there is now in the state a city of the fourth grade of the first class, but the class is provided to the end that it may receive any city of the second class which may be advanced, and that such city may thus be excepted from the operation of these acts relating to Cleveland and Toledo, which are, respectively, cities of the second and third grade, of the first class. The judicial doctrine of classification was, that all the cities having the same characteristic of a substantial equality of population, should have the same corporate power, although another class might be formed upon a substantial difference in population. The classification now provided affords no reason for the belief that it is based upon such substantial difference in population as the judicial doctrine contemplated. When the original classification, and the numerous reclassifications were made, Cincinnati was the most populous city in the state. Cleveland now exceeds it in population, but corporate powers continue to be conferred by the former description. Is it believed that a doctrine which recognized the validity of legislation applying only to the city of Cleveland because it was substantially below Cincinnati in population,

requires us to hold that similar legislation is now valid because it has the larger population? Furthermore, the increasingly numerous classes of municipalities show that even when a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. We have been required, from time to time, to examine many of the acts to confer corporate powers upon the isolated cities composing the eleven classes referred to, and others containing special classifications, and still others have been examined in the present inquiry. In view of the trivial differences in population, and of the nature of the powers conferred, it appears from such examination, that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. An intention to do that which would be violative of the organic law should not be imputed upon mere suspicion. But the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution. The provisions of the section could not be more clear or imperative, and relief from the present confusion of municipal acts and the burdens which they impose would not be afforded by its amendment. Since we cannot admit that legislative power is in its nature illimitable, we must conclude that this provision of the paramount law annuls

the acts relating to Cleveland and Toledo, if they confer corporate power.

Counsel for the relators, in support of the act relating to Toledo, urge the conclusion that even though the act should be regarded as special, it is not repugnant to this section of the constitution because, in their view, it does not confer corporate powers. The observations relating to this subject in *Cincinnati v. Parker et al.*, *ante.*, are pertinent, but they need not be repeated here. It is no longer doubted that the corporate powers contemplated by this section are those conferred upon municipalities, as well as those conferred upon private or commercial corporations. Though it might be difficult to give a conceptual definition of corporate powers which would be found complete and accurate in all cases, an accurate descriptive definition readily occurs, and it is sufficient for present purposes. They are such powers as are usually conferred upon corporations. In the present aspect of the subject they are such powers as are usually conferred upon municipal corporations. They are classified by Judge Dillon as follows:

“If we *analyze the complex powers usually conferred upon a municipality* in this country we shall discover that these are of two general classes, viz.: 1. Those which relate to health, good government, efficient police, etc., in which all the inhabitants have an equal interest and ought to have an equal voice. 2. Those which directly involve the expenditure of money, and especially those relating to local improvements the expense of which ultimately falls upon the property owners.”

Surely we shall not err if we regard the phrase “corporate powers,” as embracing all the powers which, within the observation of those who framed

and adopted the constitution, were conferred upon and exercised by all the cities of the state. Of these powers perhaps none is more conspicuously exercised than that of maintaining the public order and enforcing municipal ordinances.

It is also quite obvious that this act contemplates a large increase in the expense of maintaining the police department of Toledo, and that expense must be paid with money raised by the exercise of the municipal power of taxation. That is a corporate power. *Cincinnati v. Parker et al.*, ante. In this connection it is interesting to observe the relation of this section of the constitution to Sec. 26, of Art. 2, which provides that: "All laws of a general nature, shall have uniform operation throughout the state." It is within the knowledge common to all whose attention has been directed to the subject, that one of the most prominent of the purposes leading to the adoption of the present constitution was to relieve the people of the evils of special legislation, legislation which was enacted by the votes of representatives who were indifferent to the subject, because the legislation did not affect their constituencies. This is clearly shown by the debates in the constitutional convention, by the public history of those times, and by repeated judicial expositions of the subject. Conclusive evidence of the evil is preserved in the volumes which contain the acts of the legislature at its sessions held shortly before the adoption of the present constitution. That these important changes have been made in the organic law would not be suggested by a comparison of the bulk and contents of those volumes with the bulk and contents of those which are again appearing. These sections were admirably adapted to accomplish the purpose in view, for in their combined scope they

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seemed to comprehend the entire field in which special legislation had been enacted. Every consideration suggested for regarding the act under consideration as being without the first section of article 13, tends to the conclusion that it is within the 26th section of article 2. The reliance for the realization of the benefits contemplated by those provisions of the constitution was, first, upon the dutiful obedience of the general assembly to their requirement; and, second, upon the well established duty of the courts to adjudge all legislation in violation of constitutional limitations to be void. There is no other relief.

Counsel for the defendants further insist that the act is violative of the principles of local self-government, recognized in *The State ex rel. v. Commissioners*, 54 Ohio St., 333, particularly stated in the opinion of Minshall, J., in that case, and Cooley's Constitutional Limitations, 47; 24 Mich., 44; and of the 6th section of the 13th article of the constitution. These questions are passed without consideration, the propositions believed to have been already established being sufficient to determine the case.

Demurrer sustained, and petition dismissed.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

THE STATE OF OHIO EX REL. THE ATTORNEY GENERAL.
v. BEACOM ET AL.

Act of March 16, 1891, is a special act conferring legislative power (in the city of Cleveland)—Is repugnant to section 1 of article 13 of constitution—Constitutional law.

68	491
67	90
66	491
66	484
66	491
66	611

The act of March 16, 1891, entitled: "An act to provide a more efficient government for cities of the second grade of the first class," (88 Ohio Laws, 105) and the acts amendatory thereof, being special acts conferring corporate powers, are repugnant to section 1 of article 13 of the constitution. *State ex rel. Knisely et al. v. Jones et al., ante, 453.*

(Decided June 26, 1902.)

IN QUO WARRANTO.

The defendants are acting as, and claim to be, respectively, director of law, director of public works, director of police, director of fire service, director of accounts, and director of charities and corrections of the city of Cleveland. Together they claim to be the board of control of that city, with authority to control all the property of the city, including the money raised by taxation. The petition alleges that said claimed authority is not vested in them by any valid law. A judgment of ouster is prayed for.

The defendants answering admit that they claim and are exercising authority as charged in the petition, and they allege that such authority is lawfully conferred upon them by an act of March 16, 1891, entitled "An act to provide a more efficient government for cities of the second grade of the first class" (88 Ohio Laws, 105), and the several acts amendatory thereof. The case is submitted on demurrer to the answer. The questions presented arise out of the operation of the act which, by its terms, is limited

to "cities of the second grade of the first class," it being admitted that the act confers corporate powers, and that Cleveland, being the only city of the second grade of the first class in the state, is the only city in which the act presently operates.

Mr. John M. Sheets, attorney general; *Mr. C. D. Gibbons* and *Messrs. Goulder, Holding & Masten*, for plaintiff.

We submit that the acts under consideration and those supplemental thereto violate Secs. 26 and 27, Art. 2, Sec. 1, Art. 13, and Sec. 11, Art. 3 of the constitution.

Constitutionality of an act is to be determined by nature of subject matter.

The title of the act is: "To provide a more efficient government for cities of the second grade of the first class."

The declaration that "Under Sec. 26 of Art. 2 of the constitution, the constitutionality of an act is to be determined by the nature of its subject-matter, its operation and effect, and not alone by its form," has been so repeatedly made that it would be superfluous to cite the many cases wherein it is to be found. The fact that the word "cities" is used is not, therefore, conclusive, if at all consequential. *Railway v. Martin*, 53 Ohio St., 386; *Hixon v. Burson*, 54 Ohio St., 470.

From the decisions of the court we assume it to have been settled that whenever it appears that the object in employing language used is to give the act a general character and thereby attempt to obviate any constitutional objection, while intending to limit its operation to one city, the means adopted will fail to accomplish the object intended.

This court has held that the legislature may classify cities, and that a statute in relation to a class may be treated as a general law within the meanings of the provisions of the constitution, but it has also uniformly held that this right of classification cannot be exercised to evade the provisions of the constitution. *Costello v. Wyoming*, 49 Ohio St., 202; *Cincinnati v. Steinkamp*, 54 Ohio St., 284; *State v. Cowles*, 64 Ohio St., 162.

It has in many cases also held that the provisions of the constitution are mandatory and not directory. Citation of these cases is needless. Indeed, to cite to the court its own decisions upon the questions herein involved, is unnecessary, and is only done in recognition of a method of argument usually necessary to apprise opposing parties of authorities relied upon.

That the subject-matter of these acts is of a general nature cannot be questioned after the many declarations of this court. That they were specially designed for the city of Cleveland is apparent.

The session laws and the revised statutes both indicate that the laws were designed for Cleveland alone. It is true we do not have in this case an act whose title contains the name of the city for which it was intended, as in *State v. Pugh*, 43 Ohio St., 98, but it is to be remembered that these laws are published under authority of the legislature, and we think their publication in manner and form as provided by law is one of the indices pointing—feebly it may be—to the legislative intent. In any event, it is a circumstance to be considered.

The legislature may provide for the organization of cities by general laws, but may it do so by laws general in form, which cannot, in the very nature

of things, have uniform operation throughout the state in cities of the class specified? Can the legislature arbitrarily declare that every city of that grade and class shall have the same number of representatives in its legislative body?

The distinction between equality of representation in a body in which all political divisions are concerned and equality of representation of citizens in different political bodies is, of course, apparent, but it is contrary to the spirit of our people and their laws that in one section of the state a certain number of citizens shall be entitled to a representative in its legislative body, and in another section a representative in such body can only be obtained by a larger number of citizens, where both municipalities are declared by law to be in the same class and of the same grade. *State v. Dudley*, 1 Ohio St., 442.

Judge Sayler, in *State v. Cincinnati*, 6 Dec., 196; 3 N. P., 127, discusses the question of dividing territory into wards and the giving of wards equality of representation.

It is to be presumed that the legislature, having in mind the policy of the state, would not pass a general law having reference to various cities of the same grade and class and make a limitation upon the number of members comprising their legislative bodies, or grant to the inhabitants of one city the right to a representative in such legislative body based upon a greatly disproportionate number of electors.

This court recognized the impossibility of the legislature providing in a general law for the division of cities in *State v. Pugh*, 43 Ohio St., 98.

The impossibility of the operation of this law upon any other city than Cleveland is evidenced by the

fact that it provides for the election of councilmen from the ten districts at the *first* annual municipal election after the passage of the act, to-wit, the first Monday in April, 1891. The election in the city of Cleveland in April, 1891, was had under the provisions of this statute, but by no possibility could an election thereunder have been held in any other city.

Under the provisions of Secs. 1547, 1548, 1617, 1618, 1619, and 62 Rev. Stat., no city could possibly have changed its grade from any lower class until after November 20, 1891. *Hayes v. Cleveland*, 55 Ohio St., 117; *Hermann v. Cincinnati*, 6 Circ. Dec., 151; 9 C. C. R., 357; affirmed by Supreme Court, 52 Ohio St., 676; *State v. Maxfield*, 6 Circ. Dec., 11; 9 C. C. R., 26.

The print of that special legislation inhibited by the constitution is in other sections of the act, to which we will call the attention of the court when we undertake to discuss the duties and powers of the defendants, but we may here call attention to Sec. 80.

This provision could not by any possibility apply to corporations which might thereafter enter this grade and class.

It is further to be considered that these acts deprive and deny the citizens of Cleveland local self-government accorded to other municipalities, and that the exercise of such power in thus arbitrarily dividing cities into wards and districts is administrative and not legislative. It is a withdrawal by the legislature and a usurpation of powers theretofore always allowed to the people of the localities concerned in the exercise of the right of local self-government. *State v. Commissioners*, 54 Ohio St.,

333; *Seifert v. Weidner*, 12 Circ. Dec., 506; 12 C. C. R., 1.

Although it is evident in the recent decisions of this court that it has in mind the evils resulting from the attempted evasion of the provisions of the constitution, we cannot refrain from citing you to the opinion of Scott, J., in *Lehman v. McBride*, 15 Ohio St., 573, approved by the present chief justice in *State v. Ellet*, 47 Ohio St., 90.

That frequent attempts in recent years to evade these salutary provisions of the constitution has made these evils, which were apparent to the framers of the constitution, greater and more ramifying in their effect, is so widely known and is so clearly demonstrated in the many acts of assembly which have been passed concerning cities of the state, as to be worthy of the judicial attention which this court has recently given to such legislation.

These attempted evasions have had the result of having councilmen in some cities elected from wards, in others from districts, some for one year, others for two and three years. Nor has the legislative branch limited its attempted evasions wholly to classification provided by law, but it has attempted sham classifications in several ways, among others, by legislating for cities by fixing population, which latter character of legislation the court has declared to be in conflict with the constitution. *State v. Schwab*, 49 Ohio St., 229.

Grave doubts may well be, and have been, entertained by this court as to the constitutionality of the method of classifying cities for purposes of general legislation, but, in all cases where it has been evident that such law applies to one city or may not or cannot be of uniform operation throughout the

state, it has been held to be unconstitutional; and the mere fact that the city has not been named has been held not to change the character of the act. *State v. Ellet*, 47 Ohio St., 90; *Hixson v. Burson*, 54 Ohio St., 470; *State v. Bader*, 54 Ohio St., 666; *State v. Davis*, 55 Ohio St., 15; *Hubbard v. Fitzsimmons*, 57 Ohio St., 436; *Mott v. Hubbard*, 59 Ohio St., 199; *State v. Buckley*, 60 Ohio St., 273; *State v. Brown*, 60 Ohio St., 462; *State v. Cowles*, 64 Ohio St., 162; *State v. Ketter*, 65 Ohio St., 558.

As we understand, the court has also decided in like manner and for the same reasons *Cincinnati v. Fenner*, 65 Ohio St., 615, unreported; *Cincinnati v. Willen*, 66 Ohio St., 633, unreported.

The circuit court of Cuyahoga county has followed in the wake of the Supreme Court in *State v. Kurtz*, 11 Circ. Dec., 705; 21 C. C. R., 261.

The act of March 16, 1891, was tinkered several times during the session, and it was provided in a supplemental act passed April 10, 1891 (88 O. L., 304), to which we have heretofore called attention, that in the temporary absence of the mayor and during his temporary disability these several defendant directors, beginning with the director of law, should, under the designation of "Acting Mayor," have power to perform the duties of mayor during such absence or disability. It is also further provided that if the mayor die or remove his residence during his term of office, these several directors, in the order named, commencing with the director of law, shall become successor for the unexpired term. We submit that this provision is a violation of Art. 2, Sec. 27 of the constitution, which provides that the appointing power shall not be exercised by the general

assembly except as prescribed in the constitution and in the election of United States senators. *State v. Kennon*, 7 Ohio St., 546.

The legislation by special acts confers corporate powers. *State v. Cincinnati*, 20 Ohio St., 18; *State v. Cincinnati*, 23 Ohio St., 445.

It is apparent that the act confers new powers upon the city of Cleveland. Before calling attention to the special nature of the act as exhibited in its provisions defining the duties of the directors as heads of departments and as members of the board of control, it may be well to recall to the attention of the court the language of Owen, J., in *State v. Pugh*, 43 Ohio St., 98.

In passing upon the authority of the legislature to enact laws relating to the confinement of criminals, see opinion in *State v. Peters*, 43 Ohio St., 629; *Van Hagan, Ex parte*, 25 Ohio St., 426; *Cass v. Dillon*, 2 Ohio St., 607.

It is evident in many sections of this act that Cleveland alone was having a city government provided by these acts, and was being clothed with new, novel and additional corporate powers. This is evident even in the repealing sections, wherein legislation affecting the city of Cleveland only was wiped out.

Hence, we submit that these acts and those supplementary thereto and amendatory thereof, are unconstitutional, and for authority for the correctness of our assertion we have *Atkinson v. Railway Co.*, 15 Ohio St., 21; *Railway Co. v. Commissioners*, 27 Ohio St., 14; *State v. Mitchell*, 31 Ohio St., 592; *State v. Powers*, 38 Ohio St., 54; *Falk, Ex parte*, 42 Ohio St., 638; *State v. Pugh*, 43 Ohio St., 98; *State v. Smith*, 48 Ohio St., 211; *State v. Ander-*

son, 44 Ohio St., 247; *State v. Ellet*, 47 Ohio St., 90; *Commissioners v. State*, 50 Ohio St., 653; *Railway Co. v. Martin*, 53 Ohio St., 386; *Gaylord v. Hubbard*, 56 Ohio St., 25; *State v. Cowles*, 64 Ohio St., 162; *Hermann v. Cincinnati*, 6 Circ. Dec., 151; 9 C. C. R., 357 (affirmed 52 Ohio St., 676); *Cleveland v. Electric Railway Co.*, 60 Ohio St., 586.

Mr. M. W. Beacom and Messrs. Baker, Payer, Gage & Carey, for defendants.

Section 26 of Art. 2 has no application to this case. The scope of that section is stated in the syllabus of *Ampt v. Cincinnati*, 5 Circ. Dec., 356; 12 C. C. R., 119, affirmed in 56 Ohio St., 47.

This act confers corporate powers. Of course it does. That is the purpose for which it was passed.

Is the act of March 16th a general law? Under the rules laid down by this court to the present time, this law is general. In form the law was enacted "for cities of the second grade of the first class." That is, of course, not conclusive. The test is, can it be operated in all cities of the second grade of the first class? *State v. Cincinnati*, 52 Ohio St., 419, 448; *State v. Cowles*, 64 Ohio St., 162.

Relator claims that other cities coming into the grade and class of Cleveland could not avail themselves of this law, and he gives therefor two reasons:

First—Certain words and phrases used, make it inapplicable elsewhere.

Second—Section 2 could not be applied to other towns and cities coming into the second grade of the first class.

Preliminary to a consideration of these propositions, defendants call attention to what they deem in relator's brief a constantly recurring misappre-

hension of the rule of classification. Relator seems to think the rule to be that this law would be invalid if "the city of Cleveland alone was in contemplation when it was passed."

Of course Cleveland alone was in contemplation when this law was passed. No other city of the second grade of the first class existed at that time. The law had its origin in Cleveland, was prepared by Cleveland lawyers, and at the time of its passage no other town was in contemplation. Most laws owe their passage to a particular case, or a particular incident. This is often true even of penal laws. It is unnecessary to call the attention of this learned court to relator's misapprehension of the rule, and defendants comment upon this matter in this place in order that relator may understand unmistakably what we claim the law to be. *State v. Cincinnati*, 52 Ohio St., 419; *State v. Pugh*, 43 Ohio St., 98.

The provision that "the present council in such cities shall continue as now constituted until the next annual municipal election," in Sec. 86, might very simply and plainly be held to mean, the council which was the existing one in any city at the time it entered the grade and class, and, too, the same could be said of the word "heretofore," as used in Sec. 51, and a like construction, not a strained one either, can be placed upon every word and phrase and provision in this act to which objection is made on the ground that because of its form it can be applied only to existing cities of the grade and class. In the case of *State v. Toledo*, 48 Ohio St., 112, the effect of the presence in a law of this character of the phrase "before the next general or municipal election after the passage of this act," was under consideration. The law was held valid by

this court. The reason for so holding does not clearly appear. We can only say that the law was held valid with that provision in Sec. 3. Subsequently, *Merrill v. Toledo*, 3 Circ. Dec., 524; 6 C. C. R., 430, involved the same question as *State v. Toledo*, *supra*, and the court examined what had been determined by the Supreme Court in the former case. The circuit court said that the Supreme Court had not held that the language in that statute "before the next general or municipal election after the passage of this act" meant those immediately thereafter in the year 1889 only, and the circuit court held in substance that such language was applicable for all future time, "so long as it (the law) remains in force."

We come to the reason given in relator's brief for claiming that this act could not be applied to other cities coming into this class, which is: Section 2 could not be applied to other towns and cities coming into the second grade of the first class.

And this we answer under the following two heads:

First—The section could be applied to any other city.

Second—It is immaterial whether it could be so applied or not, for these reasons:

1. It deals with a local subject and is not necessarily general in its application.

2. It is distinct from the remainder of the act in its subject-matter.

3. The legislature provides expressly that each section shall stand alone and unaffected by invalidity in other sections.

4. In examining the title of defendants to the offices which they hold and claim the right to hold

only those sections under which they claim power will be examined.

The section could be applied to any other city. Section 2 means no more than this, that every city of the second grade of the first class shall be divided into forty-two wards, and that these wards shall be arranged into eleven districts. It is not necessary in any case that wards shall be numbered consecutively, according to their location, and this is probably never done in any city. The mode here provided for electing members of the council is not a new thing in our statutes. It is found in the Revised Statutes of 1880. By section 1656 of these statutes, it is provided that in cities of the first grade of the first class, the board of aldermen shall consist of thirty members, to be elected by districts, and that such cities are hereby divided into five districts, as follows, etc. This section, as reported by the codifying commission, and adopted by the general assembly, was part of a general act relating to the organization of municipal corporations. It would hardly be said by any one that this section was invalid, or, if so, that thereby the subsequent sections of the statutes relating to such cities were made invalid.

By an act passed March 19, 1887 (87 O. L., 125), this section was amended so as to provide a board of aldermen for Cleveland, the members of which were elected by districts composed of designated wards. The validity of this act was attacked in the Supreme Court, and the act was sustained. *State v. Ford*, 17 Bull., 326; *State v. Lawrence*, 17 Bull., 326.

It is provided by Sec. 1628, Revised Statutes, that the council may divide a municipal corporation into wards. Having the power so to do, if a new municipality becomes a city of the second grade of the first

class, the council could divide the corporation into wards and into districts in exact accordance with the provisions of Sec. 2.

The act of March 16 consists, in a general way, of three parts.

1. Section 2 defines councilmanic districts.

2. Section 1 and sections 3 to 11, inclusive, relate to the council and its powers.

3. Sections 12 to 86-2 deal almost exclusively with executive officers, their powers and duties.

This division is not sharply drawn. In the portion subsequent to Sec. 11 are found here and there provisions relating to the council. But this is substantially correct.

The law held invalid in *State v. Pugh, supra*, was so held on the ground that Sec. 9 thereof was local and special, applying to Columbus alone, and that, as the legislature would not have passed the act without that section, the whole act was therefore invalid.

Clearly nobody would pretend that the legislature would not have passed the act of March 16 without section 2. It is foreign to the scope and purposes of the act, which were to provide administrative officers and clothe them with powers and impose upon them duties. The legislature would have undoubtedly passed this act, if every portion of it other than the part relating to administration were omitted. In fact, the history of this law, and also its contents, especially when compared with the laws to which it succeeded, indicate clearly that there was no intent on the part of the legislature to modify in any material way the organization of the legislative branch or its powers or duties. The law purposed to get administrative officers who would be radically unlike, in the locating of responsibility for neglect of duty,

from those from whom they were substituted. This purpose, so evident in the law, and so well known to those who understand its history, must be continually in the mind of the court in considering this case.

The legislature provides expressly that each section shall stand alone and unaffected by invalidity in other sections.

By the act of April 2, 1891 (88 O. L., 271).

The legislature has therein declared that the validity of each section or part of the act shall be determined by the validity of the section or provision in question alone. And not only is this within the power of the legislature to declare, but it is a necessary rule of construction, where an act consists of many sections. If, for instance, it were held that the provision of Sec. 1656 of the Revised Statutes of 1880 was invalid, in which section a board of aldermen was provided for cities of the first grade of the first class, would any one say that by reason thereof the subsequent sections of that act, prescribing the duties and powers of the executive and administrative officers of cities of the first grade of the first class were rendered invalid?

The municipal code of 1880 was passed as a whole, as a single act. Would any one claim that the validity of the whole was dependent upon the validity of every part? *Alter v. Cincinnati*, 56 Ohio St., 47.

In examining the title of defendants to the offices which they hold and claim the right to hold, only those sections will be examined under which they claim power. *State v. Baughman*, 38 Ohio St., 455.

The petition of relator attacks the title of defendants to certain offices, but the brief of relator proceeds on the theory that the petition asks that the city of Cleveland be ousted from the enjoyment of any of the

provisions of the act of March 16th. The argument is made as though there were a petition to oust the municipality from having the offices, and not against the officers from filling those offices. This court, in *State v. Newark*, in 57 Ohio St., 430, has in substance said that the powers of the municipality cannot be tested in that way. The court in this present case will consider the sections which are claimed by defendants to be the source of their powers, and will not consider other sections.

And now, returning to the proposition which we are considering, we claim that there is no unconstitutionality in any of the provisions granting these defendants, either individually or collectively, the powers which they exercise, under authority of the sections above enumerated of the act of March 16th, but, if, for instance, as claimed by relator, the powers given to the director of charities and correction by Sec. 66 of this act, to "discharge any person committed to the workhouse," is invalid, or if some other detailed and minute provision should be invalid, that would not affect the validity of the law, or the title of the respective defendant, on the well known principle of partial validity and partial invalidity hereinbefore considered.

In this discussion defendants have assumed that the power of the legislature to classify cities is a constitutional power. They have assumed, and do assume, that this distinguished court will consider this case, recognizing that power. It seems clear to them that the act of March 16th is valid, judged by the law as heretofore declared. This court will not search for some phrase or expression in that act on which to rest a finding of invalidity of the entire act. Unless ready to ignore all that has been said and done in the last

fifty-one years, and ready to overrule the doctrine of classification totally, it will not find this law invalid. That doctrine has doubtless led to abuses. It is possible that the abuses may be remedied without a step so revolutionary as the repudiation of the doctrine. Some of those abuses have already been remedied. The abuse known as "ripper legislation" has been largely remedied by public opinion. The decisions of this court during the last eight years, applying strictly Sec. 26 of Art. 2, have had a strongly remedial effect.

SHAUCK, J. The admission that the act confers corporate powers, and that it, in fact, confers them on the city of Cleveland alone, would be equivalent to an admission that it is repugnant to Sec. 1 of Art. 13 of the constitution, but for the contention based upon the classification which is employed in defining the operation of the act. Our reasons for the conclusion that the classification is ineffectual for the purpose for which it is invoked are sufficiently stated in the preceding case of *The State ex rel. Knisely et al. v. Jones et al. ante*, 453. Perhaps a careful consideration of the eighty-six sections of the present act would afford additional reasons for that conclusion, but those stated in the case cited are deemed sufficient; and except as they are passed on in that case, objections urged against the validity of the present act are not considered.

Although the two acts are adjudged to be void for the same reasons, some attention seems to be due to the effect of judgments appropriate to the conclusion that both acts are ineffectual to confer the powers claimed. In that case the relators sought to be admitted to office under favor of the act which was ad-

judged to be void. The judgment denied their claim, leaving the defendants in office to continue in the discharge of its duties. In the present case the same conclusion with respect to the invalidity of legislation of the same character points inevitably to a judgment of ouster, leaving no one to exercise the functions of the offices, some of which seem to be indispensable to the orderly conduct of the affairs of the city of Cleveland.

On the hearing of the present case some members of the court, including myself, were inclined to the view that as this legislation had been permitted to become operative, and to affect in important respects the *de facto* government of the city, the inquiry should be regarded as too late, but that inclination is completely checked by attention to the considerations involved. The attorney general has invoked a jurisdiction which we undoubtedly possess; and this he has done in the discharge of his duty and in a manner conformable to established practice. It is admitted that no limitation bars inquiry into the title of the defendants. In this posture of the case we can neither refuse to act, nor act otherwise than in accordance with our views of the requirements of the constitution.

“Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will, and the constitution has appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently in-

terested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the constitution."

Cooley's Constitutional Limitations, 85 and 86.

But this is a public action, instituted and conducted solely for the protection of the public against injuries to result from infractions of the constitution, and while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension of its execution as will give to those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create; and this suspension will be until the 2nd of October, 1902.

Demurrer to the answer sustained; judgment of ouster; execution of judgment suspended until October 2, 1902.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

THE CLEVELAND, AKRON & COLUMBUS RAILWAY COMPANY v. WORKMAN, ADMINISTRATOR.

66 510
69 521

Employee of railroad—Not required, in discharge of duty, to be on main track—Is mere licensee when so doing—Such use of track subject to all risks—Company owes no special duty to licensee—Sections 3336 and 3337, Rev. Stat.—Evidence concerning warning signals by company—Rule, as to reasonable precaution by plaintiff—Charge to jury as to evidence—Contributory negligence of deceased—Pecuniary injury to each separate beneficiary—Aggregate amount, how computed—Father being negligent not entitled to damages for injury to son—Evidence as to existence of city ordinance—Parol testimony not admitted, when—Law of negligence, damages and evidence.

1. An employe of a railroad company, whose duties in the performance of his employment do not require him to be on the main track of the railroad with a three-wheeled handcar called a "speeder," but who so goes upon the main track without any invitation or inducement therefor by the company, but with no objection on the part of the company, is at most a mere licensee, and his use of the track in such manner is subject to all the risks incident to the use of the track by the company, in the same manner it was used at the time the license was granted, and the company does not owe him the duty to especially look out for and protect him, when running its trains, except to use reasonable care to avoid injuring him after discovering him upon the track.
2. Revised Statutes, sections 3336 and 3337 are intended for the protection of such persons only as are crossing the track or are about to do so; and they do not inure to the benefit of persons who are on the track and not at a crossing. *Railroad Co. v. Depew*, 40 Ohio St., 121, approved and followed.
3. Where the evidence shows that the deceased was struck by a train and killed, at a point about 600 feet from the crossing. It is error to charge the jury that it is for them to determine, from the evidence, whether the statutory signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that

Railway Co. v. Workman, Admr.

produced, in whole or in part, the death of the deceased; and in such case it is also error to charge the jury that the deceased was bound to use reasonable precautions to detect the approach of trains, and to know that the defendant might run a train over the road at that point at any time, "unless lulled into a feeling of security by a failure of the defendant's employes, in charge of its train, to observe the statutory regulations and rules of the company in the manner of running and management of the train, at the time and place of the accident and under the circumstances shown by the evidence."

4. Where it is an admitted fact that, at the time of the accident, it was so foggy that it was difficult, if not impossible, to see objects on the railroad more than a few rods distant; and there is evidence tending to show that the deceased took the "speeder" upon the main track for no reason connected with his employment other than his convenience; that after lighting one switch light he rode down the main track toward another switch light on the "speeder," with a companion, in violation of the orders of his superior, the station agent; that there was a side track, or "passing track" from a point near the station to where the other switch light was to be placed, that the deceased could have easily placed the "speeder" upon said side track and reached his destination easily and with safety; and that instead of doing so he went down the main track without keeping any lookout behind him, it is error to refuse to charge the jury that if they find such facts the deceased was guilty of such negligence as would prevent the plaintiff from recovering in the case, unless the defendant could have avoided the injury after discovering the deceased upon the track.
5. Where there is evidence tending to show that the father of the deceased was guilty of negligence directly contributing to the death of his son, and the court charged the jury that, in arriving at the amount of damages, they should consider the pecuniary injury to each separate beneficiary, first determining the value of the life of the deceased to his father, etc., but that the verdict should be for a gross sum not exceeding ten thousand dollars, it is error to refuse to charge the jury, as requested, that if they should find that the father of the deceased was guilty of negligence directly contributing to the death of his son, the plaintiff could not recover for any pecuniary loss suffered by the father for the

Railway Co. v. Workman, Admr.

death of his son. *Wolf, Admr., v. Railway Co.*, 55 Ohio St., 517, approved and followed.

6. An issue in the pleadings being whether an ordinance existed or not, it was error to permit parol proof of the passage of the ordinance; and the error was not cured by the court saying to the jury that the ordinance was a circumstance to be taken into consideration in connection with the other facts and circumstances, in determining whether the defendant was guilty of negligence, or whether the deceased was guilty of negligence which contributed to cause his death.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Knox county.

The defendant in error as the administrator of Arleigh L. Mead, deceased, sued in the court of common pleas of Knox county to recover damages from the plaintiff in error for the death of his intestate caused, as alleged, by the negligence of the plaintiff in error. The negligence charged was that the conductor and engineer of the train were negligent in running the train without a headlight and in violation of the village ordinance at a high and dangerous rate of speed, that the bell was not rung or any notice or warning given of its approach in any way whatever; that the train was not run on schedule time, but was an extra. It is alleged that the said afternoon was very foggy, making it very dark, so that it was "very difficult if not impossible to see objects on the said railroad more than a few rods in front of the engine." The answer denied the allegations of negligence and denied specifically the passage or existence of the alleged ordinance, and charged the deceased with contributory negligence. A verdict and judgment were rendered for the administrator, which was affirmed in the circuit court, and the cause comes into this court for review.

The facts are substantially as follows: The railway of the plaintiff in error passes through the northern part of the corporate limits of Buckeye City in an almost east and west direction, crossing the highway at right angles, the general direction of the road, however, being north and south. At the southeast corner of the crossing is Danville station. The railroad is perfectly straight east and west of the crossing for more than a mile each way. There is a descending grade from a point something over a mile east of the station. A switch extends along the south side of the main track, starting at the station and running east a distance of 1020 to 1040 feet, and a passing track, starting at the west side of the highway 100 to 150 feet north of the station, and running west about 2050 feet. This passing track was entirely clear on the day of the accident. The whistling post for the crossing is about a quarter of a mile east of the station. The west corporation line of Buckeye City was 582 feet from the west end of the platform and 603 feet from the station. The accident happened about 683 feet from the station. It happened on the 13th day of January, 1899. For many years the father of the decedent, J. H. Mead, had been station agent for the defendant company at this place. It was a part of his duty to light the switch lamps in the evening and bring them in in the morning. He was partially crippled and to assist him in the performance of his duties he purchased for his own convenience and used a "speeder" or three-wheeled vehicle which could be run on the track, propelled by hand and feet. He did this without objection on the part of the company. The "speeder" at the time of the accident had a brake, but the brake had been lost or broken off so that there was no way of stopping it ex-

cept by the hands. The deceased at the time of the accident was about sixteen years old and was in the employ of the company at five dollars per month as his father's assistant and night man. His duties were to light the switch lamps in the evening and bring them in in the morning, attend to the two night trains at the station and when not in school carry the mail. Mr. Mead, the father, permitted his son, the deceased, to use the "speeder" in doing his work, but cautioned him to be careful and to look out for trains when on the track. He had forbidden him to allow anyone else on it with him, but had seen him once or twice take another boy with him. It appeared in evidence that every two or three days, and sometimes oftener, extra trains ran through Danville without stopping and that one of the rules of the road provided: "Extra trains may pass over the road at any time without previous notice, and foremen must always be prepared for it. Anything that interferes with the safe passage of trains at full speed is an obstruction." At the time of the accident one J. P. McCaskey, a telegrapher out of employment, was temporarily helping Mr. Mead in the office. While Mr. Mead and Mr. McCaskey were in the office together during the afternoon, McCaskey, who was sitting at the instrument table, heard orders going over the wires, and turned to Mead and told him that an "extra" would meet No. 23 at a station east of Danville, either Brinkhaven or Baddaw Pass. Number 23 passed Danville going north at 2:52, the "extra" coming south (west) actually passed at Brinkhaven. Mead, who was busy at the time, paid little attention to the matter and it passed out of his mind. Neither he nor McCaskey communicated the fact of the "extra" being on the road to Arleigh, the deceased. Mr. Mead, the station agent,

left the station about three o'clock and went home, but before he left the deceased came in. Shortly after his father had left, the deceased took the "speeder" and a boy companion, one Herbert Parrish and started out to light the switch lamps. It does not appear that Mr. Mead, the father, knew that the deceased was going on the "speeder" that day, nor did he, nor McCaskey, nor anyone so far as the evidence discloses, inform the deceased that an "extra" was on the road. The boys backed up the main track to the north switch light, and having lighted it, they turned toward the station where they stopped for a moment to "hello" to Mr. Burrows' horse to get off the track and then went on their way down the main track toward the south switch light. They sat side by side with their faces toward the south talking together and did not at any time, until just before the accident occurred, so far as known, look behind them. They both worked the handle-bars and made the "speeder" go as fast as they could. The "extra" had no orders to stop at Danville, nor any reason to expect any. The rule of the company required each train when running after sunset or obscured by fog to display a headlight. But there was no headlight burning. The engineer testifies that a headlight would not have thrown a glare through the fog to enable parties to see that there was something coming, but there is other testimony on the subject. The train was going at full speed. There is some conflict in the testimony as to the rate of speed. The trainmen put it at twenty-five to thirty miles an hour, and plaintiff's witnesses about double that. The engine whistled, but whether it whistled for the crossing or not, or whether it gave an alarm whistle before the accident occurred is a matter of some dispute. It does not appear that the

boy heard the whistle. McCaskey, being in the station, heard the whistle and running out, called to the boys as loud as he could. They were then some fifty feet beyond the west side of the crossing. Failing to attract their attention he stood upon the corner of the platform and tried to give the engineer a signal to make him stop the train or whistle. The engine was then right up to him. The target was white which indicated there were no orders there for the train and no occasion to stop and the road was clear. As the engineer passed he saw McCaskey give a signal. He did not understand it, and turned for an instant to look again at the target and then at once turned his face down the track, and at the same instant the fireman saw the boys at the distance of one and one-half telegraph poles ahead of the train. The boys were facing south then with their backs to the train. The engineer claims to have given the alarm whistle at this time, applied the air brakes to the engine, gave a signal for the brakes, reversed his engine and did everything in his power to stop the train. The conductor and the two brakemen were in the caboose and at the whistle for brakes they ran out and set them as fast as they could. Parrish, the boy who accompanied the deceased, says that the first he knew of the danger was the rumbling of the train. They both looked back, but the train was close upon them. The trainmen say that immediately upon blowing the alarm whistle the boys turned and looked back. Parrish, sitting on the left side, succeeded in getting off, but the deceased fell back upon the track and was instantly killed. A witness who was at the station had seen the boys come down the track on the "speeder." He heard the whistle for the station as he was getting on his wagon and drove across the track, and called to

the boys as loud as he could and failed to get their attention. They were then a telegraph pole and a half from the crossing.

The existence of the alleged ordinance of Buckeye City, prohibiting the running of cars through its corporate limits at a speed exceeding eight miles an hour, was distinctly put in issue by the pleadings. On the trial the plaintiff called as a witness the mayor of Buckeye City to prove that he had given some notice to the company as to the speed of trains through the corporation. The defendant objected and the court ruled that the plaintiff should first prove the ordinance if there was one. Thereupon the witness produced the ordinance book containing the record of the supposed ordinance. Objection was made for the reason that the book was not the minutes of the proceedings of the council, nor did the record show that the supposed ordinance had ever been signed by the mayor. Thereupon the former mayor was called and a piece of paper handed to him, signed by himself and, and he says, by the city clerk, both in the presence of the council. He says it was passed one evening and posted the next day. The paper was not at that time offered in evidence, but thereupon the plaintiff again offered the book of ordinances and was permitted to read therefrom the ordinance as it appeared therein, to which ruling the defendant excepted. The record did not show that the ordinance had ever been signed by the mayor, nor that it had been published. Thereupon counsel for the defendant moved that it be stricken from the record for those reasons and because the ordinance was not evidence of the passage of an ordinance which could only be proved by the minutes of the proceedings of council. The motion was overruled and the defendant excepted. Later in the trial

the plaintiff offered the original piece of paper on which the ordinance was written, signed by the mayor and the clerk, which had been identified by the witness. Thereupon the paper was admitted in evidence, to which the defendant excepted. The minutes of the council were not produced or offered. The defendant asked the court to charge the jury as follows: "That there having been testimony adduced tending to show that the defendant's station agent at Danville station, James Mead, was guilty of negligence that contributed to the death of his son, Arleigh J. Mead, the court charges you that the plaintiff cannot recover in this case on account or by reason of any negligence on the part of the said James Mead," which the court refused to give, and the defendant excepted. But the court upon that subject, charged the jury as follows, at the request of the plaintiff: "If the jury find negligence of the defendant, its agents and servants, and also that there was negligence of the said J. H. Mead as agent and servant of the defendant, the fact of such negligence of said J. H. Mead, which, combined with the negligence of other agents and servants of the company, caused the injury, would not prevent recovery if such negligence of the defendant, its agents and servants, was the proximate cause of said injury, and said Arleigh J. Mead was not guilty of negligence contributing directly to his injury."

And the court also said to the jury upon that subject: "In actions of this kind, gentlemen of the jury, the administrator is a mere nominal party, having no interest in the case for himself or his estate he represents, as such actions are for the exclusive benefit of the beneficiaries named in the section of the statute that I referred to at the beginning of this charge. In arriving at the total amount of damages in the case

the jury should consider the pecuniary injury to each separate beneficiary, but the verdict should be for a gross sum not exceeding ten thousand dollars. * *

* What has each separate beneficiary lost in money in the death of Arleigh J. Mead, will be your inquiry. First, determine the value of his life to the father; next, the value of his life to his mother, and then to each of the seven sisters, and after you have found the value of his life to them all you will return your verdict for the aggregate sum. In considering what each beneficiary is entitled to recover you are to consider the age, the health and the ability of the deceased to perform labor and earn money. * * * The health and circumstances of the parents and the disposition and good will of the deceased to the beneficiaries as likely to result in gifts or inheritances. * * *." The defendant also asked the court to charge the jury in that connection, as follows: "The plaintiff is not entitled to recover in this action for any pecuniary loss suffered by James H. Mead, the father of Arleigh J. Mead, on account of the death of the said son, if the jury shall find that the said James H. Mead was guilty of negligence directly contributing to the death of his son." This was refused and the defendant excepted. The defendant also asked the court to charge the jury as follows: "1. That the character of Arleigh J. Mead's employment considered, and the means which he used at the time of the accident to reach the point at which he intended placing the switch light, and the other facts and circumstances surrounding the transaction considered; that the employes of the defendant upon and in charge of and in the management of the train, which caused his death, were not obliged to regulate the speed of said train with reference to the possibility of injury to said

Arleigh J. Mead, provided said employes in the exercise of proper care and caution in the management and running of said train to accomplish the purpose of their employment used all proper care and diligence to avoid said accident after they became aware of the presence of said Arleigh J. Mead upon said railroad track."

"4. It is alleged in the amended petition that the afternoon or evening upon which the accident occurred was very foggy, making it very dark so that it was very difficult if not impossible to see objects on the railroad more than a few rods in front of the engine. If you find such to be the fact and that the deceased, Arleigh J. Mead, took the 'speeder' out upon the main track and chose that means of travel for no reason connected with his employment other than his own convenience, and after lighting the north switch light returned to the station and passed with the 'speeder' down the main track to light the south switch light, taking with him a companion, in violation of the order of his superior, the station agent, said James Mead; and if you shall find that from the street crossing adjoining the station there was a side track connected at that point with said main track which led directly to the south switch where the second light was to be placed, and that the said Arleigh J. Mead could have easily used the said side track with the 'speeder' for reaching the point where the light was to be placed; and if you shall find that by so doing he would have been in a position of safety from passing trains, and that instead of so doing he chose to so go down the main track without keeping any lookout behind him or using other precautions to insure his own safety from passing trains, then I charge you that such conduct was negligence

upon the part of said Arleigh J. Mead, and such negligence the court charges you as will prevent the plaintiff from recovering in this case unless they, the jury, shall further find that the defendant's agents and employes upon and in the management of the said train that caused the accident, could have avoided said accident after they became aware of the presence of the said Arleigh J. Mead upon said track."

These requests were refused and the defendant excepted. The court charged the jury as follows: "Evidence has been offered in this case on the part of the plaintiff tending to show that the defendant neglected and failed to sound the whistle of the locomotive for the public crossing, and failed to ring the bell as provided by law on approaching and passing the public crossing a short distance from the point where the deceased met his death. Whether the bell was rung or the whistle sounded or both, is a question for you to determine from a consideration of all the evidence offered, and your conclusions on this subject would be one of the elements that you are to consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased. In this connection I will only add that it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at public road or street crossings and in dangerous places, and that the deceased, while in the employment of the company, and when at or near a public street crossing, had a right to expect the performance of that duty."

And also as follows: "A railroad track is commonly a place of danger. Whoever undertakes to walk along a railroad track or to travel thereon with a 'speeder' or other means of locomotion must take

such precautions as to ascertain the presence of danger as the ordinarily prudent person would take under like circumstances.

“The deceased, Arleigh J. Mead, on going on the defendant’s track, was bound to use all reasonable precautions to detect the presence or approach of danger from passing trains. He was bound to know that the defendant might run a train over its road at that point at any time; and ordinary care would require him to look and listen for the approach of trains; and to continuously keep alive to the approach and presence of danger from passing trains while on the defendant’s track, unless lulled into a feeling of security by the failure of the defendant’s employes in charge of its train to observe the statutory regulations and rules of the company in the matter of the running and management of the train at the time and place of the accident, and under the circumstances shown by the evidence.”

The court also charged the jury as follows with respect to the ordinance:

“Evidence has been offered tending to show that some time prior to the accident the village of Buckeye City had passed an ordinance limiting the speed of trains through the corporate limits, which it had a right to do under the statutes. The issue is made in the pleadings that this ordinance is not a valid ordinance; but the court is of the opinion that the issue is not material in the case. It does not depend on the fact whether the ordinance is valid or not. If the village council have passed an ordinance, or attempted to pass an ordinance which they supposed was valid, and notice of its passage had been communicated to the railroad authorities, and they had acted upon the assumption that the ordinance was valid, and had

regulated the speed of their trains accordingly, and also if knowledge of the passage of the ordinance had come to the deceased, it would be, for the purposes of this case, equivalent to a valid ordinance; and the deceased would have a right to presume that the company would conform to such regulation; and if he acted in accordance with such presumption, in the absence of knowledge of the fact that the railroad company had exceeded such limit in running its trains, it would not, of itself be an act of negligence on the part of the deceased. But if, on the other hand, the village had passed a valid ordinance, or had attempted to pass an ordinance without conforming to the requirements of the statute, and the provisions of the ordinance had been ignored by the company, and they had exceeded the limits prescribed by the ordinance in running trains through the village, and this fact had come to the knowledge of the deceased, the mere fact that the ordinance had been passed would not give the deceased a right to assume that the company, at the time of the accident, would regulate the speed of its train in conformity to the ordinance. Running a train in violation of an ordinance limiting the speed of trains is not, of itself, negligence on the part of the railroad company. After all, gentlemen of the jury, it is a mere circumstance for the jury to take into consideration, in connection with all the other facts and circumstances, in determining whether the defendant was negligent in the running of its train in the manner in which you find the evidence shows it was run at the time and place of the accident; and also in determining whether the deceased was guilty of negligence that contributed to cause his death."

Upon the trial several of the rules of the company were given in evidence. After the parties had rested,

after the jury had risen to their feet and some of them had left the jury box, but before any of them had retired to their room, counsel for the plaintiff requested that the book of rules of the defendant, which had been referred to, and offered during the progress of the trial, be sent to the jury to be used by them during their deliberations. This was objected to for the reason that only a small portion of the book had been offered in evidence, the plaintiff claiming that the whole book had been offered. The court said that only certain rules or parts of the book had been offered in evidence, and instructed the jury as follows: "Of course, the jury will understand that only such rules as have been offered in evidence and read to the jury during the trial will be considered by them." Thereupon the jury retired to their room. The book of rules was subsequently sent to them and was in their possession during the time of their deliberations.

Messrs. Cooper & Moore and Messrs. Watson, Burr & Livesay, for plaintiff in error.

The most serious charge of negligence against the defendant below lay in running the train through the corporate limits of Buckeye City in violation of a village ordinance prohibiting the running of trains at a speed exceeding eight miles per hour. The existence of such ordinance was distinctly put in issue by the pleadings. This put the plaintiff upon strict proof of its enactment in accordance with the statute.

Our contention is that the record of these proceedings of the council which the statute requires the clerk to keep is the best, and, unless perhaps the book should be destroyed or the like, is the only evidence admissible to prove the passage of an ordinance. We be-

lieve the rule is fundamental. 1 Greenleaf on Evidence (16 ed.), Sec. 86 and Ib., Sec. 82; Dillon on Municipal Corporations (4 ed.), Sec. 310; *City of Covington v. Ludlow*, 1 Metc. (Ky.), 295; *Parsons v. Trustees*, 44 Ga., 529; *City of Logansport v. Crockett*, 64 Ind., 319; *People ex rel. v. Starne*, 35 Ill., 121; *City of Aurora v. Fox*, 78 Ind., 1; *Steckert v. Saginaw*, 22 Mich., 104; *Morrison v. Lawrence*, 98 Mass., 219.

But the existence of the ordinance and its violation on the day in question are alleged in the petition as a chief ground of actionable negligence.

We understand the law to be that the violation of such ordinance is negligence *per se* and gives one injured by its breach, and for whose protection it was passed, a right of action against the company. *Sherman & Redfield* (5 ed.), Sec. 13.

As a general proposition a railroad company has the right to run its trains at any rate of speed not forbidden by law consistent with the safety of its trains and passengers and persons rightfully upon its right of way at road crossing and public places. *Sherman & Redfield* (5 ed.), Sec. 460 and notes; *Railway Co. v. Lawrence*, 13 Ohio St., 66.

Whether the defendant's trains should slow down at telegraph stations for possible stop orders or not was for the company itself to determine. It had the right to determine that question as it saw best, and whatever its rule or practice was in that respect would not be negligence.

But if "proper practice" in the management of railroads required such trains to slow down for the purpose indicated in the questions to Hunt, it was not a duty which the company owed to Arleigh Mead, one of its employes. The company did not owe him the duty of slowing down for a possible stop order. The

gist of the action is the violation of some duty which the defendant owed to the deceased, and not the violation of the duty which it owed to its stockholders and the public to make its service most efficient for the latter and most profitable for the former. *Patterson Railway Accident Law*, page 6; *Sherman & Redfield on Negligence* (5th ed.), Sec. 8.

That the evidence objected to, if incompetent, was seriously prejudicial seems obvious. We think the subject is covered in *Railway Co. v. Schultz*, 43 Ohio St., 270.

In the course of the trial some twenty rules from the book of rules for the government of the transportation department of defendant were offered and read in evidence by one side or the other. The book contained over five hundred rules altogether, covering time tables, signals, the movement of trains and other subjects relating to that department.

At the request of counsel for the plaintiff below, the entire book of rules was sent to the jury over defendant's objection, and remained with them during their deliberations.

Notwithstanding the caution administered by the court we think clear error was committed to the prejudice of the defendant. Many of the rules read by the ordinary juror without explanation would be grossly misleading. Others are calculated to divert the jury from the issues in the case and to work prejudice against the company "on general principles."

The jury had nothing but their memory to guide them in picking out the twenty or more rules offered in evidence of the five hundred in the book. It is not to be believed that they could observe the injunction of the court, or, if the book was used at all, confine their reading to the rules offered.

It has been often held that the delivery to the jury of an unauthorized book or paper is ground for new trial. Thus, although the paper is said to be a mere *estimate* shown to the jury by way of calculation, the court remark: "We do not know what effect this paper may have produced." Hilliard on New Trials (2nd ed.), p. 216; *Sheaff v. Gray*, 2 Yeates (Pa.), 273.

It is ground for setting aside a verdict if papers are improperly given to the jury unless by assent. *Flanders v. Davis*, 19 N. H., 139; Thompson on Trials, Sec. 2580; *Kalamazoo Mfg. Co. v. McAlister*, 36 Mich., 327; *Bates v. Preble*, 151 U. S., 149.

We call attention in this connection to the very pertinent statement of the law on this subject in *Insurance Co. v. Cheever*, 36 Ohio St., 201.

The action was brought for the benefit of the next of kin of the deceased, including the father, J. H. Mead.

There was evidence in the case tending to show negligence on the part of J. H. Mead in not warning Arleigh that the extra was coming, after McCaskey had told him that it would pass No. 23 at Brink Haven.

In the case of *Railway Co. v. Crawford*, 24 Ohio St., 631, it was decided that as the statute then stood (S. & C., 1139) it was not competent for the defendant, in order to defeat the action, to prove that some of the next of kin, for whose benefit the suit was brought, were guilty of negligence which contributed to the injury.

Shortly after the report of that decision the statute was amended so as to require the jury to assess the damages to the persons *respectively* for whose benefit the action was brought. Revised Statutes, Sec. 6135. Under this change in the statute the Supreme Court

in the case of *Wolf, Admr., v. Railway Co.*, 55 Ohio St., 517, held that in such actions "the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries, will not defeat the action as to others, who were not guilty of such negligence."

1. Looking and listening.

What one must do in the exercise of ordinary care can not *usually* be prescribed by the court, because the occasions and circumstances under which it must be exercised are of infinite variety. But the case of a person about to cross or being upon or along a railroad track is an exception. In this class of cases the law prescribes a specific line of conduct and exacts of the person specific duties unless excused by circumstances which would lead a prudent and careful man to omit their performance. The *quantum* of care in such cases is prescribed by law. *Elliott on Railroads*, Sec. 1166; *Smith v. Railway Co.*, 141 Ind., 92; *Mann v. Railway Co.*, 128 Ind., 138; *State v. Railway Co.*, 76 Me., 357; *Beach on Contributory Negligence*, Sec. 180.

He must use his senses to discover any approach of a train. If he fails to do so, the law presumes him guilty of negligence and he can not recover. The rule is a part of the alphabet of railroad law. *Beach on Contr. Neg.*, Sec. 181; *Railway Co. v. Snyder*, 24 Ohio St., 670; *Railway Co. v. Whitacre*, 35 Ohio St., 627.

Any circumstance which increases the danger increases the duty of care to avoid injury. *Railway Co. v. Morel*, 40 Ohio St., 338; *Railway Co. v. Stommel*, 126 Ind., 35; 25 N. E. Rep., 863; *Meek v. Railway Co.*, 38 Ohio St., 632; *Hart v. Devereux*, 41 Ohio St., 565; *Baker v. Pendergast*, 32 Ohio St., 494.

2. Voluntarily exposing oneself to danger.

Where an employe having a choice of two ways of performing a duty, one entirely safe, the other obviously and greatly dangerous—adopts the dangerous way, and is injured, he is guilty of negligence which will bar a recovery by him in an action against the employer based on the latter's negligence. Elliott on Railroads, Vol. 3, p. 2069, and notes.

This rule is applied in a great variety of cases. *Penna. Co. v. O'Shaughnessy*, 122 Ind., 588; *Bresnahan v. Railway Co.*, 49 Mich., 410; *Iron Co. v. Burke*, 12 Ill. App., 369; *St. Louis Co. v. Brennan*, 20 Ill. App., 555; *George v. Railway Co.*, 109 Ala., 245; *Railway Co. v. Tindall*, 57 Kan., 719; Beach on Contributory Negligence, Sec. 37, and notes; *Schafter v. Sandusky*, 33 Ohio St., 246; *Village of Conneaut v. Naef*, 54 Ohio St., 529.

For the rules applicable to similar cases to that at bar, we call attention to 3 Elliott on Railroads, p. 2048; *Penna. Co. v. Wachter*, 60 Md., 395; *Jolly v. Railway Co.*, 93 Mich., 370; *McGrath v. Railway Co.*, 18 A. & E. R. R. Cases, 5; *Burling v. Railway Co.*, 85 Ill., 18; *Railway Co. v. McKnight*, 16 Ill. App., 596.

3. Violation of order.

It is very generally held that disobedience of the rules and orders of the employer constitutes contributory negligence. 3 Elliott on Railroads, pp. 2070 and 2019, many cases cited.

This is distinctly affirmed in *Woolsey v. Railway Co.*, 33 Ohio St., 227.

Such a violation of orders will not preclude one from recovering if the disobedience in no way contributed to cause the accident. Elliott, Sec. 1292.

When one has become aware or has had reasonable notice that another has negligently put himself in a position of danger, he must use all reasonable pre-

cautions to avoid injuring him. *Railway Co. v. Kasen*, 49 Ohio St., 230.

Next to the violation of the alleged ordinance as to speed, the charge of negligence most prominently urged on the trial was the alleged failure to ring the bell and sound the whistle for this road crossing.

We think this whole theory of the case erroneous.

The foundation on which actionable negligence rests is violation of a duty which the defendant owed to the plaintiff.

But the statute in question was not made for the protection of employes upon the line of the road. The railroad company did not owe to the deceased the duty of ringing the bell and sounding the whistle at the road crossing. Patterson Railway Accident Law, under the subject of "Statutory Signals," p. 160; 3 Elliott on Railroads, Secs. 1309, 1310; Sherman & Redfield on Neg. (4th ed.), Sec. 8; Bishop on Non-Contract Law, Sec. 446.

Williams v. Chicago & Alton Railway Co., 135 Ill., 491, where the authorities are reviewed and it is held that the statutory duty to ring the bell and sound the whistle on approaching a highway crossing is intended for the benefit of travelers on the highway and passengers on the train, and that if one plowing in a field near the crossing is injured by the neglect of such duty he has no right of action based upon such neglect. *Rohback v. Pacific Railroad*, 43 Mo., 187; *Railway Co. v. McKnight*, 16 Ill. App., 596; *Randall v. Railway Co.*, 109 U. S., 478; *Harty v. Railway Co., etc.*, 42 N. Y., 468; *O'Donnell v. Railway Co.*, 6 R. I., 211.

The same principle is approved in *Railroad Co. v. Depew*, 40 Ohio St., 121, though the case is not made to turn finally upon the proposition but upon that of contributory negligence.

The deceased, when riding the speeder, was at best no more than a licensee. Elliott on Railroads, Secs. 1248, 1249.

The duties of a railroad company to one of its employes sound in contract. *Railway Co. v. Ranney*, 37 Ohio St., 665; *Alexander v. Penna. Co.*, 48 Ohio St., 623.

But an employe may become a trespasser or mere licensee. *Brevig v. Railway Co.* (Minn.), 66 N. W. Rep., 401.

The use of a speeder on the track is not the ordinary mode in which the duty of lighting switch lamps is performed.

The speeder was not owned, furnished or controlled by the company. And if the permission given by his father to Arleigh to use it was in law the permission of the company, nevertheless it was a mere permission, and made Arleigh no more than a licensee.

As to the duty of the company to the licensee, the rule is that the licensee takes his license subject to its concomitant perils and the licensor as a general rule owes him no duty except to refrain from wantonly or willfully injuring him. Elliott, Secs. 1250, 1251; *McCabe v. Railway Co.*, 88 Wis., 531 (S. C., 60 N. W. Rep., 260).

The court charged the jury that if the village council attempted to pass the ordinance, and notice of it was communicated to the railroad authorities, and, upon the assumption that the ordinance was valid, they had regulated the speed of their trains accordingly (i. e., to eight miles per hour), the deceased would have a right to presume that the company would conform to such regulation, etc.

Now there was no testimony before the jury whatsoever that the railroad company ever did reduce the

speed of its trains, passing through Buckeye City without stopping, to the limits prescribed by the ordinance.

After the supposed passage of the ordinance, and on some other occasions, when notified, the company did for a while perceptibly lower the speed of its trains, but the testimony does not show that the company ever did, even for a short time, reduce the speed of such trains to the limit of the ordinance or below fifteen to twenty miles per hour.

The charge therefore assumed a state of fact not in evidence, and in an important feature of the case.

We think it was error. *Bain v. Wilson*, 10 Ohio St., 14; *Walker v. Stetson*, 14 Ohio St., 89; *Insurance Co. v. Cheever*, 36 Ohio St., 201.

Mr. W. Stilwell and Messrs. D. F. & J. D. Ewing, for defendant in error.

The deceased, admittedly an employe, admittedly traveling the same route in his line of duty, travelled by him, during all his employment, and by those in the same positions for years before, before he starts on his trip, asks "where the local was (then the next train due)?" He then goes on usual trip and about 600 feet west of the crossing is run down.

The circumstances hereinbefore and hereinafter stated, demonstrate that he was entitled to the benefit of all customary and proper warnings, and care on on the part of the company. *Dick v. Railway Co.*, 38 Ohio St., 389; *Harriman v. Railway Co.*, 45 Ohio St., 11; *Railroad Co. v. Parker*, 41 Am. & Eng. R. R. Cas. (Ill.), 339; *Railroad Co. v. Jones*, 65 Ga., 631; *Meek v. Railroad Co.*, 38 Ohio St., 632; *Beach*, Sec. 141; *Fisher v. Railroad Co.*, 131 Pa. St., 292; *Deans v. Railroad Co.*, 45 Am. & Eng. R. R. Cas., 45; *Railroad Co.*

v. *Miller*, 25 Mich., 279; *Railroad Co. v. Lavalley*, 36 Ohio St., 221; *Railroad Co. v. Henderson*, 37 Ohio St., 549.

Bearing on the authority of the agent to employ additional hands in case of necessity, even where the employment, boy admitted as it is in the record, and proved as to the boy, see *Sloan v. Railway Co.* (Iowa), 11 Am. & Eng. Ry. Cases, 144; *Reilly v. Railway Co.*, 34 Am. & Eng. R. R. Cas., 81; *Railway Co. v. Whitacre*, 35 Ohio St., 632.

The policy of the law of Ohio as to the doctrine of liability of the defendant, in the absence of any direct notice by any closed gates or otherwise, where the person injured is guilty of negligence in going in a place of danger yet may recover if the defendant notwithstanding such negligence, might by the exercise of ordinary care have discovered the person in or approaching a place of danger, and avoided the injury, is pretty well settled. *Railroad Co. v. Picksley*, 24 Ohio St., 654; *Railroad Co. v. Crawford*, 24 Ohio St., 631; *Troy v. Railroad Co.*, 34 Am. & Eng. R. R. Cas., 13; *Railroad Co. v. Trainer*, 33 Md., 594; *Railway Co. v. Sympkins*, 54 Tex., 615; *Railroad Co. v. Whites*, 34 Am. & Eng. R. R. Cas., 22; Beach on Cont. Neg. (3 ed.), Sec. 201; *Railroad Co. v. Schade*, on a case reported in 8 Circ. Dec., 316; 15 O. C. C., 424, which was affirmed in 57 Ohio St., 650, unreported. *Railroad Co. v. Boydston*, 57 Ohio St., 642.

The position of our Ohio Supreme Court, as to the duty of the railroads and what is gross neglect, is shown in the case of *Railway Co. v. Margrat*, 51 Ohio St., 130.

This case is a good index to the law of Ohio, that, running an engine and trains, where people are expected to be at a crossing, employes or others, with-

out an outlook, or a bell or whistle signal in time that the person warned may get out of the way, is gross negligence. In 34 N. Y., it was held that a presumption exists that a signal would have benefited the injured party. In *Thompson v. Railway Co.*, 110 N. Y., 636, it was held that giving of signals does not relieve the company of imputation of negligence if it was negligent in other respects, as by running a train at a dangerous speed under the circumstances of the case.

If the company through its agents and servants has reason to know that persons are on its tracks at any particular place, it is negligence to run at great speed. *Cooper v. Railway Co.*, 66 Mich., 261; *Railroad Co. v. Esley*, (N. J. C. of Errors and Appeals) 32 Am. & Eng. R. C., 94; 2 Kent, 560.

Negligence, even when gross, is but an omission of duty. It is not designed and intentional mischief. *Railway Co. v. Munger*, 5 Denio, 255.

Beach defines it as "exceeding negligence, inadvertance in the superlative degree." *Railroad Co. v. Levy*, 19 L. R. A., 480.

Beach on Contributory Negligence, admits, Sec. 63, that a line of cases, of which an Ohio (*Kerwhacker v. Railway Co.*, 3 Ohio St., 172) case is first cited, sustains the doctrine, "that when the defendant's negligence, either *in faciendo* or *in non-faciendo*, amounts to gross negligence, the contributory negligence of the plaintiff will not prevent recovery."

The word *willful* has been construed in Kentucky, under a statute allowing punitive damages in cases of willful negligence, etc., under that statute in *Board of Int. Imp. v. Scarce*, 2 Duv., 576, being against a turnpike company, to have bridges, etc., the court held that "willful neglect of this duty means a knowledge of the insufficiency of its bridges and voluntary failure to

remedy the defect, and such defect, discoverable by ordinary vigilance, might authorize the presumption of such knowledge and neglect."

Kentucky before the statute, in *Railroad Co. v. Collins*, 2 Duv., 114, the injury was to a laborer under the orders of the engineer, and the court in the opinion not only defines incidentally "gross negligence" as being "want of proper care" but also clearly adopts the Ohio rule of *Railroad Co. v. Schade*, *supra*, and other cases in these words: "but had the appellee (plaintiff) been guilty of negligence, nevertheless the injury might have been avoided by the proper care of the engineer, and is therefore attributable to his gross negligence. *Railway Co. v. Davis*, 18 Ga., 679; *Augusta, etc., v. McElvaney*, 24 Ga., 75.

Even in Massachusetts, which adopts the New York and English rule of imputed negligence, it was held that where a child "trespasses on premises of defendant, is injured by something he does while trespassing, he can recover for wanton or recklessly careless conduct of defendant."

Beach admits, Sec. 141, that "the position of the Supreme Judicial Court of Massachusetts upon the general question of contributory negligence as well as upon that branch of it affecting infant plaintiffs, is not a satisfactory one. It has taken extreme ground upon almost every point." *Company v. Brewly*, 83 Ala., 371; *Inland Co. v. Tolson*, 139 U. S., 551; *Nathan v. Railroad Co.*, 118 N. C., 1066; *Baker v. Railroad Co.*, 118 N. C., 1015; *Railroad Co. v. Gentry*, 163 U. S., 353; *Hall v. Railroad*, 13 Utah, 244.

A man is not without remedy because he failed to look at the precise time and place when and where to look would have been of most advantage. *Rodrian v. Railway Co.*, 125 N. Y., 526. In *Railway Co. v.*

Hanna's Admr., our Supreme Court affirmed a judgment where there was no evidence of looking, traveling three-fourths of a mile, on a curve. *Kenyon v. Railroad Co.*, 5 Hun, 479; *Green v. Railroad Co.*, 11 Hun, 333.

In a case decided by the New York court of appeals January 10, 1900, reported in Chicago L. N., January, 1900, p. 195, Bartlett, J., said: "Even if contributory negligence is assumed for the argument's sake, the question remains whether the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

The court cites to that proposition a great number of authorities, among them *Grand Trunk Ry. v. Ives*, 144 U. S., 409, and this is about the latest enunciation of the highest New York court, a court contrary to Ohio and the U. S. Supreme Court, and the mass of states on the burden of proof as to contributory negligence. *Railroad Co. v. Anderson*, 8 O. F. D., 630 (75 Fed. Rep., 811), U. S. C. of Appeals, N. D. Ohio; *Railroad Co. v. Jackson*, 10 Am. & Eng. Ry. Cas., 497; *Hanton v. Ingram*, 3 Iowa, 81; *Malmsten v. Railroad Co.*, 8 Am. & Eng. Ry. Cas., 291.

Beach on Contributory Negligence admits, Sec. 37, that the Massachusetts rule in *Banks v. Street Ry. Co.*, 136 Mass., 485, and *Parker v. Naesan*, 59 N. Y., 402, that even the unlawful character of plaintiff's act in addition to the fact that it contributed to produce the injury is not sufficient to excuse the defendant where the negligence of defendant amounts to willfulness, or a reckless disregard of another's rights, or acted wantonly. *Railroad Co. v. Biggs*, 85 Ill., 80; *Kerwhacker v. Railroad Co.*, 3 Ohio St., 183; *Railroad Co. v. Smith*, 22 Ohio St., 244; Black on Law and Practice in Acci-

dent Cases, Sec. 322; Black, last part of Sec. 19; *Railroad Co. v. Martin*, 23 So. Rep., 231.

We have endeavored to cite leading cases as to the rule when in the two situations contributory negligence is no defense, and to-day the universal rule.

On care of deceased. While the evidence of Parrish cited, showing the boys heard the rumbling of the train, and looked back, and also the evidence of the engineer and the fireman, showing they looked back, proves watchfulness on the part of the boys, as is also shown by the inquiry, by deceased as to where the local was before starting, still as to the time prior to the time mentioned by Parrish and engineer and fireman, the presumption is, that the boy used all due care. *McBride v. Railroad Co.*, 19 Ore., 64; *Railroad Co. v. O'Brien*, 161 U. S., 452; *Railroad Co. v. Whitton*, 80 U. S. (13 Wall.), 275; *Allen v. Willard*, 57 Pa. St., 379.

Contributory negligence. The burden of established contributory negligence of plaintiff is on defendant, in Ohio, the United States Supreme Court, the courts of England, and all the states, except Massachusetts, New York, Indiana, Michigan, Iowa, Connecticut, and perhaps one or two others. Originally Oregon and North Carolina also ranged with these. *Schweinfurth v. Railway Co.*, 60 Ohio St., 223; *Beach on Contributory Negligence*, Secs. 426, 439.

In states where this rule maintains the absence of negligence is presumed from the love of life. Black, pp. 9 and 13. In cases of doubt the presumptions are against any fault on the part of people from known disposition of men to avoid injury. Black on Pleadings & Proof, etc., Sec. 7 and notes, and pp. 9, 13; *Beach on Contributory Negligence*, Sec. 426; 31 Md., 357; *Gaynor v. Railway Co.*, 100 Mass., 208; *Johnson*

v. *Railway Co.*, 20 N. Y., 65 (later reversed in New York and Massachusetts).

In the absence of testimony it is presumed that the person killed, looked and listened. 7 Western Reporter, 324; *Wynning v. Railway Co.*, 64 Mich., 93; *McBride v. Railway Co.*, 19 Oregon, 64.

It is presumed that the deceased exercised due care. *Schum v. Railway Co.*, 107 Pa. St., 8; *Railway Co. v. Hall*, 61 Pa. St., 366; *Railway Co. v. Crawford*, 24 Ohio St., 636; *Railway Co. v. Nolthenius*, 40 Ohio St., 376.

The language of Beach on Contributory Negligence, probably the most open advocate of every principle to the contrary, in Sec. 426 of his work, cited, demonstrates the strength of this position in our courts. "That the presumption being in favor of the plaintiff, that he was, at the time of the accident, in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct," is the doctrine of the Supreme Court of the United States and of nearly all the states of the union including Ohio.

Other authorities have been cited which are still more specific as to the presumption of care, as an element of evidence.

The allegation of care is no more necessary in pleading than is proof even in New York and Massachusetts, which have the other rule as to burden, except in Pennsylvania, Iowa and Indiana. *Fuller v. Railway Co.*, 133 Mass., 491; *Lee v. Gas-Light Co.*, 98 N. Y., 115.

The principle of the decisions in New York and Massachusetts is not the correct or logical one followed in Ohio, and states in which the rule as to burden is as stated. *Sherman & Redfield* (5 ed.), Par. 109; *Railway Co. v. Kerr*, 62 Pa. St., 361; *Gay v. Winter*, 34 Cal., 153; *Bank v. Seymour*, 64 Mich., 64;

McBride v. Railway Co., 19 Ore., 65; *Willard v. Tathan*, 57 Pa. St., 374.

While we claim that the ordinance was duly published under the proof, the provision requiring publication is directory, not mandatory, and a compliance with it, is not a condition precedent to the validity of an ordinance. *Commonwealth v. Davis*, 140 Mass., 485; *Commonwealth v. McCaferty*, 145 Mass., 384; *Sacramento v. Dilmen*, 102 Cal., 107.

The statute requiring an ordinance to be authenticated by the signature of the mayor, is merely directory; *Blanchard v. Bissell*, 11 Ohio St., 96; *Stevenson v. Bay City*, 26 Mich., 44; *Martindale v. Palmer*, 52 Ind., 411; *McKinzie v. Woodey*, 39 La. Ann., 944.

That the question is open to proof and disproof, and the certificate only *prima facie* is shown in the last sentence of Sec. 1697, providing for publication by posting up, to-wit: "Such certificate shall be *prima facie* that the copies were posted up as required."

Section 1699 says, "transcripts of any by-laws, resolutions or ordinances, certified by its clerk, shall be received in evidence for any purpose for which the original books, ordinances, etc., would be received."

It is true, as courts often say, no person would be injured on a railroad, if he did not go upon it. Any other rule would reverse a case, if the employe went upon the track at all, as in *Railway Co. v. Margrat*, 51 Ohio St., 131, where admittedly Margrat could have seen the engine coming, and avoided the injury. *Dick v. Railway Co.*, 38 Ohio St., 389; *Meek v. Railway Co.*, 38 Ohio St., 631.

We cite authorities in some states generally favorable to corporations: *Fulliam v. Muscatine*, 70 Ia., 436; *Emporia v. Schmidling*, 33 Kan., 485; *Spearbraker v. Larrabee*, 64 Wis., 573; *Millcreek Tp. v.*

Perry (Pa.), 12 Atl. Rep., 149; *Lowell v. Watertown*, 58 Mich., 568.

DAVIS, J. In the theory of this case which seems to have been entertained by the trial court, there are several radical errors. Nearly all of them result from a misconception of the relation of the deceased to the plaintiff in error. That he was an employe of the railway company is not disputed; but at the time of the accident his position and his conduct were not within the scope of his duty. He was on the main track with the speeder for his own convenience and under circumstances which made his presence there uncalled for and dangerous in the extreme. Such acquiescence in the occasional use of the speeder by the deceased and his father, as may be implied in this case, at best, amounts to no more than a permission for that purpose, and constituted the deceased a bare licensee. The company did not object to the use of the speeder, if it knew of it, nor did it offer any inducement or invitation therefor. 2 Thompson Negligence (2 ed.), Secs. 1722, 1723. The deceased took the license with its concomitant perils. The acquiescence in the use of the track with a speeder did not involve an undertaking on the part of the company to modify its rights as to the user of its own property; nor could it change its obligations to the public as a common carrier of passengers and freight. The trial court in this case, not without some warrant of authority it must be admitted, took the view, and so instructed the jury, that it was the duty of the railway company to exercise reasonable care, not only to avoid injury to the deceased after it discovered him upon the track, but that it was its duty to keep a careful lookout to discover and avoid injury to any person who might happen to be on its

track at that place and at that time, and that this duty was implied in the license to the deceased and his father. It was in this view, apparently, that the court refused to give to the jury the defendant's first request to charge, and instructed the jury instead that the defendant "had a right to run its cars at the time and place of the accident at any speed and in any manner consistent with safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all circumstances surrounding the locality, and having a due regard to the safety of persons who might be upon its tracks. It was required to use ordinary care in running its train, having due regard to the rights of others." Such a conception of the law is opposed to reason because a bare licensee must know that his license is subject to all the risks incident to the use of the track by the company, in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty toward him. Therefore, the company owed him no duty of active vigilance to especially look out for and protect him. *Railway Co. v. Aller*, 64 Ohio St., 192; 3 Elliott on Railroads, Sec. 1250. It is believed that it is also contrary to the weight of authority. 3 Elliott on Railroads, Secs. 1250, 1251; 2 Thompson Negligence (2 ed.), Secs. 1709, 1711, 1712, 1723, 1724; *Railway Co. v. Vittitoe's Admr.* (Ky.), 41 S. W. Rep., 269. It may be added here, that the rule is substantially the same as to trespassers and mere licensees, that is, licensees without invitation or inducement. An employee who goes upon the track or elsewhere upon the company's premises not in the line or discharge of his duty, and without any invitation, express or implied, is at most

a mere licensee to whom the company owes no duty to keep such place safe. 3 Elliott on Railroads, Sec. 1251, and cases cited; 1303 and cases cited; *Railway Co. v. Marsh*, 63 Ohio St., 236; *Baker, Admr., v. Railway Co.*, 95 Iowa, 163; *Railroad Co. v. McKnight*, 16 Ill. App., 596; 1 Thompson on Negligence (2 ed.), Secs. 945, 946.

The doctrine of *Harriman v. Railway Co.*, 45 Ohio St., 11, does not apply here, because there is in this case no pretense of acquiescence in the public use of the railway track in the way in which it was used by the deceased, nor was there any invitation or inducement held out to the deceased to so use it. There was at most only a failure to object to such user. We cannot think, therefore, that the trial court was right in instructing the jury as it did in this regard, and in refusing to instruct as requested in the defendant's first request.

In this connection we will consider the instructions of the court to the jury in regard to signals. Seemingly having in mind the erroneous theory criticised above, the trial court called the attention of the jury to the fact that evidence had been introduced by the plaintiff tending to show that the defendant had neglected and failed to give the statutory signals required on approaching and passing a public crossing, and the jury were instructed that it was for them to determine, from the evidence, whether such signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased; and further, that the deceased was bound to use reasonable precautions to detect the approach of trains, and was

bound to know that the defendant might run a train over the road at that point at any time, "unless lulled into a feeling of security by the failure of the defendant's employes, in charge of its train, to observe the statutory regulations and rules of the company in the matter of running and management of the train, at the time and place of the accident and under the circumstances shown by the evidence." It was also charged that the deceased, while in the employment of the company, and when at or near a public street crossing, *had a right to expect* the performance of that duty. The accident did not happen at or near the crossing, but more than six hundred feet west of it, and not while the deceased was crossing the track, but while he was traveling longitudinally upon it. Independently of the theory of liability to a bare licensee, which we have already discussed, this raises the question whether the statutory duty to give signals when approaching a crossing, inures to the benefit of persons on the track and not at a crossing. The statute obviously is not for the protection of persons who are not crossing the track or about to do so; for not only is the whistle to be sounded before reaching the crossing, but the bell is to be continuously rung until the crossing is passed. The signals are not required at any other time. This is the construction which has been adopted in several jurisdictions where the question has arisen. It was fully considered and distinctly decided in *Railroad Co. v. Depew*, 40 Ohio St., 121, 127-129. Also in the following cases: *O'Donnell v. Railroad Co.*, 6 R. I., 211; *Harty, Admr., v. Railroad Co.*, 42 N. Y., 468; *Williams v. Railroad Co.*, 135 Ill., 491; *Railroad Co. v. McKnight*, 16 Ill. App., 596; *Rohback v. Railroad Co.*, 43 Mo., 187; *Toomey v. Railroad Co.*, 86 Cal.,

374; *Hale v. Railroad Co.*, 34 S. C., 292; *Railway Co. v. Gravitt*, 93 Ga., 369; 2 Thompson on Negligence, (2 ed.), Sec. 1707. There being no legal duty, in that regard, due from the defendant to the deceased, this instruction to the jury was erroneous.

Up to this point, we have endeavored to consider the questions of law which were under review without complicating them with the subject of contributory negligence. It becomes necessary now to look at that phase of the case. The court refused to instruct the jury as requested in the defendant's fourth request. This instruction was sound and ought to have been given. If it were found to be true that the deceased chose to travel with the speeder upon the main track for no reason connected with his employment, other than his convenience; that he rode down the main track with a companion, on the speeder, in violation of the order of his superior, the station agent; that from the station to the south switch light there was a "passing track" on which he could have placed the speeder and easily and with absolute safety have reached his destination, and that instead of doing so he chose to go down the main track, without keeping any lookout behind him, there can be no doubt that he was guilty of negligence which proximately contributed to his own injury, unless the defendant could have avoided the injury after discovering the deceased upon the track. The authorities sustaining this proposition are so numerous that it would be practically impossible to cite them all here. We content ourselves with citing a few pertinent cases and leading text writers, with the cases collected and cited by them: 3 Elliott on Railroads, Sec. 1303, and cases cited in notes thereto; 2 Thompson on Negligence, (2 ed.), Secs. 1734, 1738, 1747, 1748 and 1774, and

cases cited in notes thereto; *Ream v. Railroad Co.*, 49 Ind., 93; *Railroad Co. v. Depeu*, 40 Ohio St., 121; *Burling, Admr., v. Railroad Co.*, 85 Ill., 18. It will be seen from these authorities that the instruction, as requested, states the law more strongly against the company than was necessary. It makes the qualification that "unless the jury shall further find that the defendant's agents and employes * * * could have avoided said accident after they became aware of the presence of the said Arleigh J. Mead, upon said track." Strictly speaking, the law would require the defendant, after discovering the deceased to be upon the track, to use reasonable care under the circumstances to avoid the accident, not absolutely to avoid it; but this being an error against the party asking the instruction, it should not have been refused for that reason. Besides, the instruction which was asked, specifically challenged the attention of the jury to some very important circumstances affecting the claim of contributory negligence, and the error of refusing this is nowhere cured in the charge as given.

Again, the defendant asked the court to charge the jury that the plaintiff could not recover on account of, or by reason of, any negligence on the part of James H. Mead, the father of the deceased, at that time the agent of the defendant; and also that plaintiff could not recover for any pecuniary loss suffered by the father of deceased, on account of the death of his son, if the jury should find that the father was guilty of negligence directly contributing to the death of his son. These requests were refused. There was, it is true, no issue in the pleadings upon this subject; but the court did charge the jury that "in arriving at the total amount of damages in the case, the jury

should consider the pecuniary injury to each separate beneficiary, but the verdict should be for a gross sum not exceeding ten thousand dollars," and that "what has each separate beneficiary lost in money in the death of Arleigh J. Mead, will be your inquiry. First determine the value of his life *to the father*, next the value of his life to his mother," etc. Having done this and having given the jury the plaintiff's requests, numbered 13 and 19, the defendant's request that the jury should also be instructed that the plaintiff would not be entitled to recover for any pecuniary loss of the father, if the jury should find that the father was guilty of negligence directly contributing to the death of the son, could not properly be refused. *Wolf, Admr., v. Railway Co.*, 55 Ohio St., 517.

The trial court and the counsel for the defendant in error seem to have entertained the view that the question raised concerning the ordinance of Buckeye City, related to the validity and effect of the ordinance; but the issue in the pleadings was as to the legal passage and existence of the ordinance. The evidence to show the existence of the ordinance was clearly incompetent and insufficient, and the charge of the court did not cure the error of admitting it. It left the ordinance with the jury, as if it were a proven fact, instructing them that it was a circumstance to be taken into consideration, "in connection with all other facts and circumstances, in determining whether the defendant was negligent in the running of the train in the manner in which you find the evidence shows it was run at the time and place of the accident; and also in determining whether the deceased was guilty of negligence that contributed to cause his death." Nothing more needs to be said on that subject.

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Another manifest error was the sending of the book of rules to the jury to be used by them in their deliberations, only a few of the rules having been offered in evidence. Upon this record we would not reverse for that error, because it does not clearly appear that the company was prejudiced thereby; but we mention it in order that we may not seem to have approved it, and for the guidance of the trial court hereafter.

The judgments of the circuit court and the court of common pleas are

Reversed.

BURKET, SPEAR, SHAUCK and PRICE, JJ., concur.

66	546
67	82
67	84
66	546
66	564
66	546
69	205
69	206
69	210

THE STATE OF OHIO EX REL. GUILBERT, AUDITOR, v.
YATES, AUDITOR OF PICKAWAY COUNTY.

County officers not local officers—But part of state organization—Subject of compensation not one of local nature—Must be uniform throughout the state—Section 26, Art 2 of Const.—Invalidity of acts of April 22, 1896 and March 29, 1898—Constitutional law.

1. County officers are not local officers, but are a part of the permanent organization of the government of the state, and the subject of compensation to county officers is not local in its nature, and an act of the general assembly upon that subject is a law of a general nature which must operate uniformly throughout the state. *Pearson et al. v. Stephens et al.*, 56 Ohio St., 126, overruled.
2. The "act relating to the duties and compensation of certain county officers in Pickaway county," passed April 22, 1896 (92 O. L., 597), and the act amending sections 1, 2, and 5. thereof, passed March 29, 1898 (93 O. L., 507), are unconstitutional, being in conflict with the first clause of section 26, article 2, of the constitution.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Pickaway county.

A petition in mandamus was filed in the circuit court of Pickaway county, praying that a writ of mandamus may issue, commanding the defendant as auditor of Pickaway county that he proceed according to law and collect for his fees, compensation and salary those provided for under the following sections of the Revised Statutes, to-wit: 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1365, 2775, 2774, 2785, 2888, 2908, 4903, 6909, 7382, 7387, and that he cease to draw from the treasury any salary, fees or compensation or perquisites provided for in the act passed April 22, 1896 (92 O. L., 597), and the act passed March 29, 1898 (93 O. L., 507), and to treat such acts as nullities and to observe the forms prescribed by the auditor of state and to observe the instructions and constructions of the general statutes of the state named, and to report to the auditor of state by certified statement of the amount of fees and moneys received or due the county treasurer, recorder, sheriff, prosecuting attorney, probate judge, commissioners and clerk of the court of common pleas, etc.

The judgment of the circuit court was in favor of the defendant in error.

Mr. J. M. Sheets, attorney general, and *Mr. J. P. Bradbury* and *Mr. F. S. Monnett*, for plaintiff in error.

Mr. Irvin F. Snyder, for defendant in error.

Mr. Charles Gerhardt, for defendant in error.

[Briefs were submitted by counsel on both sides but the main points presented by each are sufficiently indicated in the opinion.—REPORTER.]

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DAVIS, J. These acts are undeniably special; and, to us at least, it seems almost as manifest that their subject-matter is of a general nature, and that neither of them contains the attributes of legitimate local legislation. They are special, because they are in terms restricted in their operation to Pickaway county. They are of a general nature, because the subject of legislation is a matter of general concern to the state, and to every county in the state and to the inhabitants thereof. *Kelley v. State*, 6 Ohio St., 272. They are not legitimate local bills, because the subject-matter is not peculiar to the localities named and it does not appear that there was any necessity for such legislation either in time, place or circumstance. Having said this, we have said, in substance, all that needs to be said to dispose of this case; but in deference to the authority which is urged in support of the contention of the defendant in error, we will be more explicit.

It should be premised that we do not feel bound by previous decisions of this court when they do not commend themselves to us by essential soundness; and this is especially so when constitutional limitations are involved. No amount of wrong adjudication can justify a practical abrogation of the constitution. We may well pause and consider carefully when we find our views to be in conflict with those entertained by our predecessors; but if it be found that the conflict is honestly irreconcilable, there is but one course to take, and that is to follow our own convictions. The obligation of a judge is that he will support the constitution, and that he will faithfully and impartially discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding, and not ac-

cordova to the authority and understanding of some other person or persons, however great or however numerous.

Almost the whole of the argument in favor of the validity of these statutes is grounded on the line of decisions beginning in *Cricket v. State*, 18 Ohio St., 9, 22, and culminating in *Pearson v. Stephens*, 56 Ohio St., 126. The initial case was an action against a county auditor and his sureties to recover money which it was alleged had been received as fees without authority of law. There had been no attempt at local legislation, and no statute was cited, which was even claimed to be local in its operation. There were two general laws under review. Both of the distinguished counsel had been judges of this court; and it is not disparagement of the able men who then constituted the Supreme Court to say that either of the counsel was the peer in ability of any of them. Yet it was not even suggested in argument so far as we can discover, nor was it involved in the case, that the compensation of a county officer was in its nature local. The eminent lawyer who represented the plaintiff in error assumed, and it does not seem to have been disputed, that the statutes then under consideration were general laws; but he contended that they were not uniformly operative throughout the state, and that they were therefore void. He said: "The laws under consideration *relate to counties and their organization*, and to the compensation of an officer *common to them all*. I do not doubt that a salary might be provided for auditors graduated upon population; but I do deny that *a part* can be compensated *with salaries* and *a part with fees*, or that a part can be given one salary, and, *under exactly the same conditions* the other part another.

In other words, different regulations may be prescribed for different things, but no two regulations for the same thing. These acts do that very thing; they attempt to give a *different compensation to auditors in counties having the same population and performing the same duties.*" This language clearly expresses the constitutional question which was presented, and we cannot help thinking that it was not fairly met by the court, in that case. The question was put out of the case by the court's construction of the act of 1862. It was at this point that White, J., injected the famous *dictum* which became the point of departure from the constitution. "And for myself, I will say that it seems to me the amount of compensation to be attached to a local office, is a question in its nature local, and that a law to regulate such compensation cannot properly be regarded as a law of a general nature."

One false premise underlying this proposition, and it reappears in the opinion by the same judge in *State ex rel. v. Judges*, 21 Ohio St., 10, 11, is the assumption that a county office is a local office. County and township organization is provided for by article 10 of the constitution. The general assembly are therein required to provide by law for the election of such county and township officers as may be necessary. Can it properly be inferred from this that the general assembly may deem it necessary to provide for county and township officers in only one or more counties or townships? Manifestly not. The constitution contemplates county and township *organization* throughout the state, and, by Sec. 26, Art. 2, it imposes on the general assembly the duty of making it uniform throughout the state. Such offices, therefore, are local only in the sense that the

legislature has provided for their *election* by the people of the respective counties or townships, and that their duties are to a large extent circumscribed by the county or township boundaries. They are constituent parts of the scheme of permanent organization of the government of the state. As such the legislature is required by Sec. 20 of Art. 2 to fix the compensation to be attached to the office. It was said by Scott, J., in *Walker v. Cincinnati*, 21 Ohio St., 50, 51, that "this clause cannot be regarded as comprehending more than such offices as may be created to aid in the permanent administration of the government." It cannot include merely local agencies of the government, for such agencies are merely adventitious and temporary, and compensation to them must be provided for with the occasion which calls for their creation. There does not seem, therefore, to be solid ground for Judge White's assumption that a county office is a local office, from which assumption he draws his conclusion that a law to regulate the compensation attached to a local office (*i. e.*, a county office), is a local law. With just as much reason it may be argued that all laws relating to the filling of vacancies in county offices (Sec. 27 of Art. 2 of the constitution) are local laws, from which it would follow that there may be as many ways of filling vacancies in county offices as there are counties in the state. If the theory propounded here is correct, that these salary bills are constitutional as local laws, then there may be as many modes of compensating county officers as there are counties in the state, notwithstanding the provisions of the constitution, Sec. 26, Art. 2, which the framers of the constitution believed to be an effective safeguard against the evils of special legislation. To show

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that the danger to the state, which is spoken of above as a possibility, is likely soon to be an accomplished fact, a tabulated statement of the special salary bills already enacted is here given :

Counties.	Clerk.	Auditor.	Treasurer.	Recorder.	Sheriff.	Prosecuting attorney.	Surveyor.	Infirmary director.	Commissioners.	Probate Judge.	Coroner.
Allen.....									\$1000		
Ashland.....									600		
Athens.....	\$1650	\$2000	\$3000		\$3000	\$200			600	\$1800	
Auglaize.....									1200		
Belmont.....									1000		
Brown.....	1800	2200	2000	\$1200	2100	1200		\$150	800	1800	\$300
Butler.....									1000		
Champaign.....									1000		
Clark.....									1400		
Clermont.....	2000	2700	2250	1400	2500	1200	700	150	1200	2500	150
Coshocton.....	1800								800		
Crawford.....	1800	2100	2000	1200	2000	1000		250	1000	1800	
Cuyahoga.....	4000	5000	7000	4500	4000	4000				5000	2500
Darke.....								300			
Fairfield.....									900		
Fayette.....	1500	1800	1750	900	1800	700	720	100	500	1800	100
Franklin.....						2000			2000		
Fulton.....		2000	1800	1200		600		175			
Galla.....								75	900		
Guernsey.....									900		
Hamilton.....						3500			900		
Henry.....									1000		
Highland.....	1100	1800	1800	1000	1500	1000	500	200	750	1800	
Holmes.....	1000	1500	1200	700	1200	700			800	1000	
Jefferson.....									1000		
Knox.....	1700	2200	2250	1800	2550	900				2100	
Lawrence.....	1600	1800	1600	1200	1700	1100				1600	
Logan.....									1000		
Lucas.....	3000	4500	4000	4000	3000	3000			3500	2000	
Marion.....	2400	2800	2500	1800	2400	1100	2200	250	1000	2400	150
Medina.....									5 pd		
Meigs.....	1000	1000	1250		1000	750			600	1000	
Miami.....	2000	2500	2500	1350	2000	1200		240		2000	200
Montgomery.....						2000					
Morrow.....	1050	1500	1300	800	1400	400		100	500	1400	50
Muskingum.....	2000	2500	2400	1500	2200	1400	800	200	1000	2400	300
Noble.....									700		
Ottawa.....	1800	1800	1800	1200	1500	700		200	900	1200	
Paulding.....									850		
Pickaway.....	2600	2400	2200							2200	
Putnam.....	2400	2500	2500	1600	2500	1100		250	1800	2500	
Ross.....									1200		
Sandusky.....	1600	1800	2000	1500	1800	900		200	1000	1800	120
Seneca.....								200			
Tuscarawas.....	2000	2000	1800	1500	1900	1100		225	900	2000	250
Van Wert.....									1200		
Warren.....									900		
Williams.....									800		
Wood.....									1500		

There is abundant food for study, for both lawyers and legislators, in the statistics shown in this table; but we linger over it only long enough to remark that: 1. Already more than half the counties of Ohio have special laws regulating the compensation of county officers by salary, while the other half compensate by fees. 2. In the counties compensating by salary neither the officers provided for, nor the salaries, are uniform. 3. In many counties, for example Pickaway, some of the county officers are compensated by salary and others by fees. Whether the inequalities which appear here can be totally eradicated by general legislation, we are not called upon to determine. Perhaps it might be accomplished, as suggested *arguendo* by Judge Ranney in *Cricket v. State*, by compensation graduated upon population, or perhaps, by compensation graduated upon the income of the office, or again through the medium of a state board or commission whose duty it would be to regulate compensation; but it must be borne in mind that the uniformity in compensation which is required, is not uniformity in the total amount received, but uniformity in the rate of compensation, that is, that the same compensation shall be paid for the same service. So that it would seem that the suggestion in the opinion, in *Pearson et al. v. Stephens*, 56 Ohio St., 131, that general legislation upon this subject would result in "as many different rules upon the subject as there are counties within the state," and that it would end in the evil which the provision against local legislation was designed to prevent, is unsound. However, whether the discrimination against special or local legislation, in the constitution is ineffective or not, does not concern us in the present discussion. That is a problem to be worked out by the general as

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sembly. We are satisfied at all events that the loose construction of the constitution in which this court has heretofore indulged, is in part responsible for the abnormal condition of things shown above and we feel disposed to distinctly and finally repudiate it now. The case of *Hart v. Murray*, 48 Ohio St., 605, is merely an affirmation of the theory stated by Judge White in *Cricket v. State*, and *State v. Judges*, which we have already considered.

We come now to *Pearson et al. v. Stephens*, 56 Ohio St., 126. Counsel for the defendant in error are at some pains to emphasize the inconsistency between the opinion of this court in that case, and one of the arguments for plaintiff in error here, the opinion and argument being the production of the same person. We concede that the opinion in *Pearson et al. v. Stephens*, states the case for the defendants in error here as strongly as it may be put; but after full consideration we prefer the judgment of Philip in his latter condition. The brief of the eminent counsel makes it entirely clear, if indeed any comment was needed to make it clear, that in its final analysis the decision in *Pearson et al. v. Stephens*, rests altogether on the observation of White, J., in *Cricket v. State*. He also makes it clear that the court as then constituted, entertained doubts concerning the question whether this was a subject which *must* be regulated by general law, operating uniformly throughout the state, and that, therefore, the problem was resolved in favor of the constitutionality of the statute. A majority of the court considering this case entertain no such doubt, and, while freely admitting that the future may possibly develop conditions which may demonstrate that the conclusions now reached are erroneous, yet with all

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the light which we now have, we are constrained to, and do unhesitatingly, overrule the case of *Pearson et al. v. Stephens*, because the doctrine therein declared, that local legislation on the subject of the compensation of county officers is constitutional, is exactly the opposite of our deliberately formed convictions.

The judgment of the circuit court is

Reversed.

BURKET, SHAUCK and PRICE, JJ., concur.

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THE STATE OF OHIO EX REL. ALLISON v. MACKEY ET AL.

Act "To limit compensation of county officers" in certain county—Is law of general nature and therefore invalid and void—Sec. 26, Art. 2 of Const.—Act to take effect when a majority of the voters declare in its favor—Is law passed upon approval of authority other than general assembly—And is therefore unconstitutional—Constitutional law.

1. The act "to limit the compensation of county officers in Holmes county," passed April 26, 1898 (93 O. L., 660), is a law of a general nature which does not operate uniformly throughout the state; and it is therefore in violation of the constitution, article 2, section 26. *State ex rel. Guilbert v. Yates, ante*, 546, approved and followed.
2. An act of the general assembly not coming within the exceptions stated in the constitution, article 2, section 26, which is passed to take effect and be in force when a majority of the voters at an election shall declare in favor of a salary law, and if a majority of the voters do not so declare to be void, is passed to take effect upon the approval of authority other than the general assembly, and it is therefore unconstitutional and void.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Holmes county.

The first named case is a petition for a writ of mandamus against the defendants commanding them to perform the duties imposed upon them by law, namely, that the defendant Garver, as prosecuting attorney, shall examine and certify, and the defendant Tannehill, as probate judge, shall examine and approve the itemized statement of account of the relator for *per diem*, mileage and expenses as the relator avers he is entitled to, and for all proper relief.

Petition set out the act 93 O. L., 660, and alleged that it is in violation of this constitution, Art. 2, Sec. 26.

The second case named is an action in the name of the state by Theodore Allison as a citizen and taxpayer of Holmes county, to enjoin the defendants from receiving and paying money under an act entitled "An act to limit compensation for county officers in Holmes county," passed April 26, 1898 (93 O. L., 660). Both the court of common pleas and the circuit court rendered judgment in favor of the defendants in error.

Mr. W. Stilwell, for plaintiff in error.

Questions. Is this act 93 O. L., p. 660 in violation of Sec. 26, Art. 2, of the constitution of Ohio?

First—In being on a subject of a general nature, yet local.

Second—In submitting to a vote of the people the question of taking effect of the law.

The provision for a vote takes the case out of the rule that otherwise the act takes effect on its passage. 7 Law. R. R., 3764; *Barto v. Hinrod*, 8 N. Y. (4 Seld.), 482.

The question is not operating under an act in force, a sample of which, in the same year is, general Sec. 2825, Rev. Stat., 93 O. L., 99. Every law requires the act of some person for its execution. Such are the cases of *Railway Co. v. Commissioners*, 1 Ohio St., 77; *Gordon v. State*, 46 Ohio St., 609; *Hammond v. Haines*, 25 Md., 541; *Parker v. Commonwealth*, 6 Pa. St., 507; *Locke's Appeal*, 72 Pa. St., 491.

Section 26, Art. 2 exempts from its operation school laws, while Sec. 30, Art. 2, and Sec. 13, Art. 7, specially provide for vote on taking effect in certain cases. Of this character are *State ex rel. v. Commissioners*, 5 Ohio St., 497; *Noble v. Commissioners*, 5 Ohio St., 524; *Peck v. Weddell*, 17 Ohio St., 271; *Weaver v. Cherry*, 8 Ohio St., 564.

The views of all parties in constitutional convention of 1851, are found in 2 Deb., 218-228, 568, 579, 633, 807, 831, 833. Private corporation acts are on a different basis. *Angell & Ames Corp.*, 81.

Except in Kentucky on the prohibition question; Wisconsin and one or two other states having no constitutional prohibition, which have served from true principles. Sound reasoning, and authorities sustain our claim. *Cooley on Taxation*, 63; *State v. Young*, 28 Minn., 474; *People v. Nevada*, 6 Cal., 143; 6 Am. & Eng. Ency. of Law, 1023; *Cooley Const. L.*, 137-146; *Santo v. State*, 2 Iowa, 165; *State v. Geebrick*, 5 Iowa, 491; *State v. Weir*, 33 Iowa, 134; *State v. Morris* (N. J.), 12 Al. Reg. (N. S., 32); *Lammert v. Lidwell*, 62 Mo., 188; 65 Ga., 645; *State v. Simmons*, 32 Minn., 540; *Dampf's Appeal*, 106 Pa. St., 72; *State v. Armstrong*, 3 Sneed (Tenn.), 634; *Territory v. Stewart*, Wash., 98; *People v. Clark*, 47 Cal., 456; *Richmond v. Fisk*, 160 Mass., 62; *Scofield v. Lansing*, 17 Mich., 437; *Bellinger v. Gray*, 51 N. Y., 610; *Robinson*

v. *Dodge*, 18 Johns. (N. Y.), 351; *State v. Hahn*, 474; *Bremer v. Inhabitants*, 62 Me., 62; *State v. Copeland*, 3 R. I., 33; *State v. Wilcox*, 45 Mo., 458; *Wall, Ex parte*, 48 Cal., 279; *Lum v. Robertson*, 71 U. S. (6 Wall.), 279; *The Oliver, In re*, 17 Wis., 681; *State v. O'Neill*, 24 Wis., 149; *Smith v. Janesville*, 26 Wis., 291, misconceived the *Railway Co. v. Clinton Co.*, 1 Ohio St., 77, as is shown by quotation in *Oliver, In re*, 17 Wis., 681, from *People v. Burr*, 13 Cal., 357.

So also in *Commonwealth v. Weller*, 14 Bush (Ky.), 218, the court misunderstood *Cooley*, p. 223. *State v. Parker*, 26 Vt., 357, is no authority as the act took effect in any event. See also as to the Vermont case of *People v. Collins*, 3 Mich., 343.

The rule *expressio unius*, etc., in absence of prohibition of such submission would exclude such legislation.

Indiana and Oregon have like provisions as Sec. 26, Art. 2, and in both states have been held to prohibit submission to a vote as to taking effect of the act. *Maize v. State*, 4 Ind., 343; *State v. Monroe*, 11 Ind., 484; *Brown v. Fleischner*, 4 Ore., 132.

A vote is not a contingency contemplated which refers to operating under a law in effect. See same authorities.

We also cite *Starin v. Genoa*, 23 N. Y., 439; *Gould v. Town*, 23 N. Y., 456; *Bank of Rome v. Rome*, 18 N. Y., 38.

Mr. Wm. F. Garver, for defendants in error.

I. Law is presumed valid.

A doubt of the constitutional validity of a statute is never sufficient to warrant its being set aside. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which

any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. To be in doubt, therefore, is to be resolved, and the resolution must support the law. Cooley on Const. Law, 160; *Supervisors v. Brogden*, 112 U. S., 261; *Railway Co. v. Commissioners*, 1 Ohio St., 77; *State v. Garver*, 13-23 O. C. C., 140.

II. A county salary law is constitutional. *Cricket v. State*, 18 Ohio St., 9.

It is not essential to the exaction of fees that they should inure to the personal benefit of the officer. The officers are but the agents of the state for transacting the public business, and it is immaterial to those receiving their services whether the sum to be paid therefor goes to the officer or into the public treasury, provided no more is exacted than is just and reasonable for the facilities afforded and the service performed. *State v. Judges*, 21 Ohio St., 1.

In the case of *Hart v. Murray*, 48 Ohio St., 605, the court, construing the act of May 15, 1886, placing the justices of the peace of Cleveland on a salary, says: "But it is contended that the act of May 15, 1886, is a law of a general nature which does not have a uniform operation throughout the state, and is therefore in violation of Sec. 26 of Art. 2 of the constitution. The act, in our view, is local in its character. Its design is to regulate the amount of compensation to local officers, and does not come within the constitutional inhibition."

The system of compensation provided by the act is complete without reference to the penalties for official misconduct prescribed by Sec. 13, or to the effect to be given to an official bond by Sec. 14 of the act. Wherefore this system of compensation may be separated from and executed independently of these two sec-

tions and is not affected by the question of the constitutionality of either or both of them. *Pearson v. Stephens*, 56 Ohio St., 126.

Since the decision in the Miami county case, *Pearson v. Stephens*, *supra*, similar salary laws have been passed for the following counties: Brown, 93 Ó. L., 574; Holmes, *Ib.* 660; Pickaway, *Ib.*, 507; Tuscarawas, *Ib.*, 513; Athens, 94 O. L., 697; Clermont, *Ib.*, 408; Crawford, *Ib.*, 581; Erie, *Ib.*, 459; Fayette, *Ib.*, 599; Highland, *Ib.*, 412; Knox, *Ib.*, 510; Lawrence, *Ib.*, 549; Marion, *Ib.*, 672; Meigs, *Ib.*, 432; Morrow, *Ib.*, 689; Muskingum, *Ib.*, 681; Ottawa, *Ib.*, 453; Putnam, *Ib.*, 622.

Thus the people of eighteen counties, relying upon that decision, have prevailed upon the general assembly to give them county salary laws. Will this court reverse that decision in face of the arguments advanced by the able judge who rendered that decision? And when they know that by so doing the county affairs of eighteen counties will be plunged into hopeless and almost inextricable confusion.

III. When did the first twelve sections go into effect?

The question is answered in two cases. *State v. Perry Co. (Comrs.)*, 5 Ohio St., 497, and *Noble v. Noble Co. (Comrs.)*, 5 Ohio St., 524. The court held that for the purposes of the vote, the acts took effect on their passage, though their operative effect was made dependent upon a vote of approval by a majority of the electors voting therefor. *State v. Garver*, 13-23 O. C. C., 140.

Applying the above rule also disposes of plaintiff in error's query as to whether Sec. 13 required a vote in the whole state, as to a local act. The relator in his petition says, "The taking effect of said act is made

to depend upon a vote of the electors of Holmes county."

Applying the above rule also disposes of relator's claim that printing the question on the general ballot instead of a separate ballot was illegal. If relator had any objections against printing the question on the general ballot instead of on a separate ballot, he might have raised the question at the time by injunction, in which case he would not now be here contending that the salary law deprives him of his *per diem* under Sec. 897, Rev. Stat.

IV. Submission to voters is constitutional.

The decision of the circuit court in this case contains a very able and thorough discussion of this point and we cite *State v. Garver, supra*, and by reference make the same a part hereof. Compare the concluding paragraph with the conclusion in *Gordon v. State*, 46 Ohio St., 607.

But it is not always essential that a legislative act should be a contemplated statute which must in any event take effect as law, at the time it leaves the hand of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. Cooley on Const. Lim., 137-138.

It is worthy of consideration, however, whether there is anything in the reference of a statute to the people for acceptance or rejection which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves would be equally impracticable and inconsistent with the representative system; but to take the opinion of the people upon a bill already framed by representatives and submitted to them is not only practicable, but is in precise accordance with the mode

in which the constitution of the state is adopted and with the action of many other cases. *Cooley*, Const. Lim., 141, note; *Railway Co. v. Geiger*, 34 Ind., 185.

The legislature may make a local law depend for effect upon the will of all the voters of a locality, or a majority, or upon the assent of a few. *Hobart v. Supervisors*, 17 Cal., 23; *People v. Burr*, 13 Cal., 343.

The act of March 1, 1872, is not unconstitutional for the reason that by the provision of Sec. 3, the previous sections were to be void, unless the town or citizens of Skowhegan should perform the same conditions therein mentioned. *Walton v. Greenwood*, 60 Me., 356; *State v. Parker*, 26 Vt., 357.

An act authorizing voters to vote for license or against license was held constitutional in *Locke's Appeal*, 72 Pa. St., 491.

A valid law may be passed, to take effect upon the happening of a future contingent event, even where that event involves the assent to its provisions by other parties. *Mayor v. Clinet*, 23 Md., 449; 42 Md., 71.

The taking effect of a statute affecting a particular county alone may constitutionally be made dependent upon the popular vote of that county. *Commonwealth v. Weller*, 14 Bush (Ky.), 218; 29 Am. Rep., 407.

The Holmes county salary law was perfect in all its parts and could be enforced without any other legislation, when it left the hands of the general assembly. Since its passage, two sessions of the general assembly have been held, in which the law could have been repealed or amended.

An act of the legislature affecting the people of the whole state is not invalid because by its terms it was to take effect only after it should be approved by a majority of the popular vote at a certain election. *Smith v. Janesville*, 26 Wis., 292.

Cooley on Const. Lim., page 144, note, in commenting on above decision, says: "This decision, though opposed to many others, appears to us entirely sound and reasonable."

Act of March 1, 1851, providing that the subscription to the capital stock of a railroad shall not be made until the assent of a majority of the electors of the county is constitutional. *Railway Co. v. Commissioners*, 1 Ohio St., 77.

An act authorizing a subscription to the capital stock of a railroad, provided for a vote of the people, as a condition precedent to this subscription, and was held constitutional. *Cass v. Dillon*, 2 Ohio St., 607.

Ranney, J., dissents from opinion in *Cass v. Dillon*, *supra*, and cites clauses of constitution which he claims have been violated, but does not claim Sec. 26 of Art. 2, of constitution has been violated. *Weaver v. Cherry*, 8 Ohio St., 565; *Dexter v. Raine*, 10 Re., 25; 18 Bull., 61; *Newton v. Mahoning Co.*, 26 Ohio St., 618; *Peck v. Weddell*, 17 Ohio St., 271; *Gordon v. State*, 46 Ohio St., 607.

Particular attention is called to the citation and discussion of authorities in case last cited, *Gordon v. State*.

The Ohio decisions uniformly support the proposition that "The taking effect of a statute may constitutionally be made dependent upon the popular vote." We challenge plaintiff's attorney to furnish an Ohio authority to the contrary.

DAVIS, J. The statute "to limit the compensation of county officers in Holmes county," (93 O. L., 660) which is drawn in question in these cases, is in conflict with the first clause of Sec. 26, Art. 2 of the constitution. For the reasons for our conclusion on

State ex rel. Allison v. Garver et al.

this point we refer to *State ex rel. Guilbert v. Yates*, ante, page 546, which reasons need not be repeated here. This act is unconstitutional, also because it is conditioned to take effect only upon the result of an election by the people (Constitution, Art. 2, Sec. 26, second clause). Section 13 of the act provides for a vote upon the proposition, "For the county salary law. Against the county salary law;" and then provides that if a majority of the votes cast on said proposition shall be in favor of a salary law the act "shall take effect and be in force" from and after a day named, otherwise that the act should be void. The act cannot take effect under the Revised Statutes, Sec. 77, because it contains a provision as to the time when it shall take effect and be in force, if at all. Hence the taking effect, as well as the enforcement of the statute, is made to depend on the approval of another authority than the general assembly, namely, the will of a majority of the electors. The entire legislative power of the state is vested in the general assembly (Constitution, Art. 2, Sec. 1), and even without the limitation contained in Sec. 26, Art. 2, it could not be delegated. It was held in *Railroad Co. v. Commissioners*, 1 Ohio St., 77, 87, which was a case under the constitution of 1802, that the power of the general assembly to pass laws could not be delegated by them to any other body or to the people; and this proposition is abundantly sustained by numerous authorities cited in the brief of the plaintiff in error.

The cases of *State ex rel. v. Commissioners*, 5 Ohio St., 497; *Noble et al. v. Commissioners*, 5 Ohio St., 524; *Peck v. Weddell*, 17 Ohio St., 271, and *Newton et al. v. Commissioners*, 26 Ohio St., 618, were all cases in which it was required by the consti-

tution (Art. 2, Sec. 30) before the taking effect of the laws that they should be submitted to the electors of the counties to be affected thereby and adopted by a majority of the electors voting at such election. In each of those cases the question was whether some other thing than the voting was necessary before the law could "take effect;" and the court held that the acts became laws when adopted by a majority of the electors of the county, but that the legislative intention was that the law should not be enforced until the condition precedent should be performed. In *Trustees v. Cherry et al.*, 8 Ohio St., 564, the court held that the vote which was required was a condition precedent to make an assessment to pay for the grounds which the trustees were authorized by the act to purchase. In *Gordon v. State*, 46 Ohio St., 607, the act in question provided that it should take effect and be in force from and after its passage; but the question was whether the local option provision contained in the act rendered it unconstitutional. The court held that the act "was a complete law when it had passed through the several stages of legislative enactment and derived none of its validity from the vote of the people. In all its parts it is an expression of the will of the legislative department of the state." Our conclusion is that there is nothing either in principle or the decisions of this court contravening the view which we have expressed concerning the effect of Sec. 13 of the act (93 O. L., 660). It affects the whole act and the act is as if it never had been passed.

Judgment of the circuit court and of the court of common pleas

Reversed.

BURKET, SHAUCK and PRICE, JJ., concur.

SPEAR, J., concurs in the judgment of reversal and in the second proposition of the syllabus.

THE STATE, ON COMPLAINT OF COOK v. COOK.

Proceedings in contempt—Against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability—Money decree for alimony not a debt within constitutional inhibition against imprisonment—But is a punishable order under Sec. 5640, Rev. Stat., for contempt—Enforcement of alimony decree where case is remanded from circuit to common pleas court.

1. In a proceeding in contempt against a party who has refused to comply with a money decree for alimony, it is not essential that the complaint allege that the party is able to pay the money. The decree imports a finding of the court that he is able to pay, and the burden is on him, by allegation and proof, to establish his inability.
2. A final money decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt, but is such an order as that, under favor of section 5640, Revised Statutes, punishment as for a contempt may follow a willful failure to comply with it.
3. Where such decree for alimony is rendered by the circuit court, and the cause remanded by that court to the court of common pleas for execution, a proceeding to enforce the judgment by attachment for contempt is properly brought in the court of common pleas.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Crawford county.

In an action pending on appeal in the circuit court of Crawford, from the common pleas of that county for alimony, wherein Ellen C. Cook, as wife of Edward W. Cook was plaintiff, and said Edward W. Cook, with others, was defendant, the circuit court duly found upon the evidence that the allegations of plaintiff's petition concerning the extreme cruelty and gross neglect of duty charged against said Edward W. Cook towards her to be true, and that said Edward W. abandoned her without cause or excuse,

State on complaint of Cook v. Cook.

and that in consequence thereof and of ill treatment on his part towards her, the parties had separated, and that by reason of the premises she was entitled to alimony out of the estate and property of the said Edward W., and to a judgment therefor. And the circuit court thereupon ordered, adjudged and decreed that said Edward W. Cook pay to said Ellen C. Cook, as her reasonable alimony, in money, the sum of \$400.00, payable as follows: \$50.00 in thirty days from the 3d day of October, 1896, and \$50.00 in each six months thereafter, till the full amount of said sum of \$400.00 is fully paid. And that in default of any such payment by him such payment or payments in default were to bear interest at six per cent. from maturity. The court also adjudged the costs of said cause against him. And it was further ordered by said circuit court that said cause be remanded to said court of common pleas for execution and to carry said decree of said circuit court into effect.

More than thirty days having elapsed since the maturity of the said sum of \$50.00 to be paid in thirty days from October 3, 1896, and no part having been paid, nor the interest maturing thereon, nor any part of the said costs, said Ellen C. Cook filed her written charges of contempt against said Edward W. Cook in said common pleas court, and moved said court in writing to allow an attachment to issue against him, commanding the sheriff of said county to arrest him and bring him before said court, to show cause why he should not be punished as for a contempt of court, for the reasons set forth in said motion.

The court of common pleas, sustaining said motion, thereupon ordered the sheriff to arrest and bring said Edward W. Cook before the court on the 5th day

of January, 1897, to show cause as aforesaid, and the court fixed the amount of his undertaking for his appearance on January 5, 1897, and such other times and places as the court might direct to answer said charges of contempt.

The said Edward W. Cook, being arrested, refused and neglected to enter into any bond, but filed his answer to said written charges, to which said Ellen C. Cook filed her reply. Trial was had on the charges and pleadings and evidence, and the court found the written charges of contempt against Edward W. Cook to be true, and that it was yet in his power to pay said alimony and to perform said orders of said circuit court remanded to said common pleas court for execution or other process, and the said common pleas court duly adjudged the said Edward W. Cook guilty of a contempt, and ordered him to be imprisoned until he should comply with said orders and judgment set forth in said written charges. And afterwards said Edward W. Cook filed his motion to vacate the judgment and order, which, upon a full hearing, was overruled. No bill of exceptions was taken either upon the trial of the charges of contempt or upon the hearing of the motion to vacate the judgment and order of the common pleas.

The defendant in error afterwards filed his petition in error in the circuit court, which court reversed the judgment of the common pleas upon the grounds that the complaint for attachment was insufficient in law, and that the common pleas had not jurisdiction to entertain and grant the motion for attachment, and dismissed the complaint of the plaintiff filed in the common pleas.

To reverse this judgment of reversal the present error proceeding is brought.

State on complaint of Cook v. Cook.

Mr. L. C. Feighner, for plaintiff in error, cited and commented upon the following authorities:

Sections 549, 5239 and 5640, Rev. Stat.; *Hulett v. Fairbanks*, 41 Ohio St., 401; Sec. 6726, Rev. Stat.; *Lockwood v. Krum*, 34 Ohio St., 9; *Conrad v. Everich*, 50 Ohio St., 481; *Effinger v. State*, 5 Circ. Dec., 408; 11 C. C. R., 389; *Fricke v. Fricke*, 10 Circ. Dec., 203; 18 C. C. R., 433; *Hand v. Hand*, 12 Re., 202; 25 W. L. B., 214; *Musser v. Stewart*, 21 Ohio St., 353; *Olin v. Hungerford*, 10 Ohio, 270; *Hurd v. Hurd*, 65 N. W. Rep., 728; *Holtham v. Holtham*, 26 N. Y. Supp., 762; *Andrew v. Andrew*, 62 Vt., 495; *Curtis v. Gordon*, 62 Vt., 340; *Erwin v. Schaffer*, 9 Ohio St., 43; *Concklin, In re*, 3 Circ. Dec., 40; 5 C. C. R., 78; *King v. Barnes*, 21 N. E. Rep., 183; *Rapalje Law Dic.*; *State v. Knight*, 54 N. W. Rep., 412; *Bishop Crim. Law* (7 ed.), Sec. 241.

Messrs. Finley & Gallinger and **Messrs. Beer & Monnette**, for defendant in error, cited and commented upon the following authorities:

Bolles v. Stockman, 42 Ohio St., 445; *Mason v. Alexander*, 44 Ohio St., 333; Sec. 5641, Rev. Stat.; *Davis v. State*, 50 Ohio St., 194; *Railway Co. v. Sloan*, 31 Ohio St., 1; *Puterbaugh v. Smith*, 19 Am. St. Rep., 30; *Clark v. People*, 12 Am. Dec., 183n; *Langdon v. Circuit Judges*, 76 Mich., 358; *Deaton, In re*, 105 N. Car., 59; *Conrad v. Everich*, 50 Ohio St., 481; *Lockwood v. Krum*, 34 Ohio St., 1; *Pancost v. State*, 8 Circ. Dec., 546; 15 C. C. R., 246; *Bank v. Bank*, 6 Ohio St., 254; *White v. Gates*, 42 Ohio St., 109; *Edgarton v. Hanna*, 11 Ohio St., 323; *Kaderabek v. Kaderabek*, 2 Circ. Dec., 236; 3 C. C. R., 419; *Galland v. Galland*, 13 Am. Rep., 167; *Howell v. Fry*, 19 Ohio St., 556; Secs. 5239 and 6726, Rev. Stat.; *Cincinnati v. Railway Co.*, 56

Ohio St., 675; *Hulett v. Fairbanks*, 41 Ohio St., 401; Secs. 4954, 4959, 4967, 4968, 4970, 5235, 5373, 5641, 5642, 5644, 5645 and 5646, Rev. Stat.; *State v. Chaffee*, 6 Ohio, 150; Alderson on Judicial Writs, Sec. 4; *Craig v. Fox*, 16 Ohio, 568; *Lowe v. State*, 9 Ohio St., 337; Anderson's Law Dic., 242; Works on Courts and their Jurisdiction, 498; 1 Thompson on Trials, Sec. 124; Darly's case, Term Sup. Ct., 3 Wheeler, C. C., 7; *Robinson v. Kious*, 4 Ohio St., 593; *Dunlap v. Robinson*, 12 Ohio St., 530; *Eaton v. French*, 23 Ohio St., 560; *Heffner v. Scranton*, 27 Ohio St., 579.

SPEAR, J. The ground of reversal by the circuit court was twofold: one that the complaint is insufficient in law, and the other that the common pleas had not jurisdiction to entertain and grant the motion.

1. Was the complaint sufficient in law? The specific objection is that it does not allege that it was then in the power of the defendant to perform the act, that is, pay the money. We are of opinion that the objection is not good. The order of the trial court fixing the amount of the alimony to be paid was an imperative order. It was made, presumably, after due inquiry into the defendant's financial condition, and was fixed at an amount which the court found was reasonable and that the defendant would be able to pay. It being shown, therefore, that the defendant had not obeyed the order of the court, a *prima facie* case, at least, had been made that he was in contempt provided the failure to satisfy a final decree for alimony could be made the basis of a proceeding in contempt. It followed that the burden was upon the defendant to show that it was not in his power to obey the order, and, if this be so, then it would also follow that the complainant was not required to allege such want of ability in the complaint.

Nor is this an unreasonable requirement. The defendant's financial condition and ability to pay were peculiarly within his own knowledge. They could not be known with the same certainty to the complainant, nor could she easily produce evidence to maintain the proposition were the burden of proof placed upon her. *Hurd v. Hurd*, 63 Minn., 443; *Andrew v. Andrew*, 62 Vt., 495; *Holtham v. Holtham*, 6 Misc. (N. Y.), 266.

But if this were not so, still no substantial injustice was wrought in this case by the holding of the common pleas. In his answer the defendant set up, in affirmative terms, that he had no means wherewith to pay and that he was utterly insolvent. This was denied by the reply. The issue thus was presented, and the same being tried the court found it was in the power of the defendant to pay the alimony but that he still refused to do so, and adjudged accordingly. So that, in either view, the holding of the common pleas on this phase of the case would not be reversible error.

2. A more serious question is involved in the contention of defendant in error with reference to the power of the court to punish for contempt one who fails to pay a final judgment for alimony. The contention is that money decreed for alimony, made upon final trial, is not such an order that punishment as for a contempt may follow a failure to comply with it. It is insisted, in support of this proposition, that the judgment for alimony is a debt, and that imprisonment for debt does not obtain in Ohio. Of course if this proposition is true the conclusion follows by force of the constitutional provision, section 15, article 1: "No person shall be imprisoned for debt in any civil action, on *mesne* or final process, unless

in cases of fraud." But is the claim a debt within the meaning of this clause? It is described as a judgment, but it is not supposed that the term applied to the adjudication aids much in defining its real character. Many claims result in judgment in some form which do not have their origin in debt.

Authority for the provision for alimony to the wife rests upon two clauses of our statutes. That where divorce is granted is found in section 5699, and is: "When divorce is granted by reason of the aggressions of the husband, the wife * * * shall be allowed such alimony out of her husband's real and personal property as the court deem reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of the divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court deems just and equitable." That where alimony alone is granted is given in section 5703 thus: "The court shall upon satisfactory proof of any or all of the charges in the petition * * * give judgment in favor of the wife for such alimony out of her husband's real or personal property as is just and equitable, which may be allowed to her in real or personal property, or both, or in money payable either in gross or in installments." It seems manifest that so far as the obligation of the husband enters into the consideration and affords a basis for the court's action, it is not a debt in the sense of a pecuniary obligation; it arises from a duty which the husband owes as well to the public as to the wife, but it is not upon any specific contract; nor is the proceeding in which the adjudication is had a civil action. The liability orig-

inates in the wrongful act of the husband against the consequences of which the public as well as the wife has the right to be protected. Beyond this the provision for alimony is an allowance. It is in the nature of a partition. Recognizing the right of the wife to participate in the accumulations which are presumably the result of their joint efforts and joint economies, and having in mind at the same time any property which may have come to the husband by the marriage, the law wisely awards the wife a just and equitable proportion of the whole, and for purposes of convenient execution and to meet all varying situations, this allowance may be made either in real or personal property, or both, or in money, payable in gross or in installments, as to the court may seem reasonable. The court does not decree alimony as a debt to the wife, or as damages to be paid to her by her late husband, but as a part of the estate standing in his name in which she has a right to share, fixed by the court in its discretion and thus appropriated to her, and to which she thereupon becomes legally entitled. The withholding of this allowance, therefore, by the husband, when able to respond, is a refusal to abide by and perform the order and decree of the court, and it is difficult to see why such refusal should not be punished as a contempt for the same reason and upon the same grounds that orders and decrees of courts of equity, in injunction and the like, are in like manner enforced. Our statute, section 5640, provides punishment as for a contempt for "disobedience of, or resistance to a lawful writ, process, order, rule, judgment or command of a court," etc. This enactment may not receive a literal interpretation, but may properly be restrained as in *Bank v. Becker*, 62 Ohio St., 289, and still have application to a proceeding

resting on a decree for alimony. In that case, treating of debts, it is held that: "Money obligations resting upon contract, express or implied, and judgments rendered thereon, are debts within the purview of section 15 of the bill of rights, which forbids imprisonment for debt in civil actions." We are not to be understood as meaning that this holding directly supports the proposition that a decree for alimony is not a debt. It is, however, a carefully considered declaration in a case involving the general question, and is entirely consistent with that proposition.

It has been supposed by some that the power of punishment for contempt for refusing to pay alimony is confined to orders for payment of alimony *pendente lite*, such orders being for the maintenance of the wife during the litigation and the payment of her necessary expenses in conducting it; and it is apparent that the refusal to comply with such orders does tend to obstruct the course of justice, an incident not present in the case at bar. We are of opinion that this distinction simply furnishes an additional reason for the enforcement of the order, but does not differentiate the two cases in principle.

It is held in *Conrad v. Everich*, 50 Ohio St., 476, that a decree for alimony in money payable in gross will operate *per se* as a lien on lands and may be enforced by execution, and this case is cited as establishing that a decree for alimony is a debt. We think it is not authority for the proposition. True the opinion cites some cases wherein it is held that such decree creates a debt of record, but it is to be noted that the learned judge who reported that case favors the construction that the right to alimony is based upon the duty of the husband to afford support to the wife and a paramount obligation springing out of a sacred re-

lation which, when it passes into judgment, should carry with it the well known binding force of judgments at law. In other words, there should be afforded to the injured party all remedies practicable for the enforcement of her rights and the collection of her just demands. This, we think, falls short of holding that alimony is a debt within the meaning of the constitution. See, also, *Lockwood v. Krum*, 34 Ohio St., 1.

We are of opinion that the decree for alimony is not a debt within the meaning of the constitutional inhibition; that it comes fairly within the provision of section 5640, *supra*, and that a refusal to comply with the order, the party being able, may be punished as for a contempt. *Lewis v. Lewis*, 8 Ga., 706; *Wightman v. Wightman*, 45 Ill., 167; *Hurd v. Hurd*, *supra*; *Andrew v. Andrew*, *supra*; *Lyon v. Lyon*, 21 Conn., 185; *Lansing v. Lansing*, 41 How. (N. Y.), 248; *Ex Parte Perkins*, 18 Cal., 60; *Dwelly v. Dwelly*, 46 Me., 377; *Rapalje on Contempts*, Sec. 36; *Stewart's Marriage and Divorce*, Sec. 378; 4 *Ency. P. & P.*, 803; 2 *Bishop's Marriage and Divorce* (6 ed.), section 498. See, also, *Musser v. Stewart*, 21 Ohio St., 353.

3. It remains to consider whether or not the proceeding in contempt was instituted in the right court. Did the defendant's conduct put him in contempt of the judgment of the common pleas, or was it of the circuit court? Provisions of the statute having application are:

"Section 549. The supreme court or the circuit court may remand its final decrees, judgments or orders, in cases brought before it on error or appeal, to the court below, for the specific or general execution thereof, as the case may require, and may also re-

mand causes which so come before it to the inferior courts for further proceedings therein."

"Section 5239. When the circuit court makes a final order, or renders a final judgment, in cases brought before it on appeal, it may enforce the same by process issued therefrom, or may remand the same to the common pleas for execution or other process; the clerk of the circuit court shall certify the same to the common pleas, and the clerk of the common pleas court, on receipt of the certified transcript shall immediately enter the same on the journal; and the judgment or orders so entered, unless otherwise directed by the circuit court, shall for the purpose of execution and other process, stand as the judgment of the common pleas court."

"Section 6736. When a judgment or final order is reversed, either in whole or in part, in the common pleas court, the circuit court or the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the case to the court below for such judgment; * * * the court reversing or affirming such judgment or final order, shall not issue execution in causes that are so brought before it on error, on which it pronounces judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, for execution thereon, and the court to which such special mandate is sent shall proceed in the same manner as if such judgment or final order had been rendered therein," etc.

The question is not without difficulty. Much may be said, and well said, perhaps, on either side, and authorities are in apparent conflict. We do not enter into a discussion of it here, but content ourselves with the announcement that, considering all the statutes

bearing upon the question, and especially having in mind the general policy of our legislation in the direction of entrusting the enforcement of all final judgments and decrees of reviewing courts to the court of general jurisdiction, to-wit, the common pleas, this court is of opinion that the better view is that it is the purpose of the statute to vest in that court power to enforce decrees remanded to it of this character by all appropriate process and proceeding, and that, therefore, the proceeding in contempt was in this case properly instituted in the common pleas. See *Hulett v. Fairbanks*, 41 Ohio St., 401.

Grounds other than those assigned by the circuit court are urged by counsel for defendant in error as justifying the reversal of the judgment of the common pleas. We have considered the points presented, but are unable to agree that they afford sufficient ground for reversal.

It follows that the judgment of the circuit court will be reversed and that of the common pleas affirmed.

Judgment reversed.

BURKET, DAVIS and SHAUCK, JJ., concur. PRICE, J., not sitting.

THE SOUTHERN GUM COMPANY ET AL. v. LAYLIN, SEC-
RETARY OF STATE.

An excise tax may be imposed by the state, when—A franchise tax may be imposed upon domestic and foreign corporations—State is sovereign except as limited by U. S. Constitution—Limitation of such taxes not to exceed reasonable value—Determination of value vested in general assembly and finally in court—Tax of one-tenth of one per cent. on capital stock—Under act of April 11, 1902, is valid—Constitutional law.

1. The state is a sovereignty, with sovereign powers, except as limited by the constitution of the United States.
2. While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare.
3. By reason of these limitations a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts.
4. An excise tax may also be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption, in part at least, of the individuals composing such body from liability for its debts.
5. A franchise tax may be imposed by the general assembly upon corporations, both domestic and foreign, doing business in this state.
6. The tax of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock of corporations as provided for in the act of April 11, 1902, entitled "An act to require corporations to file annual reports with the secretary of state, and to pay annual fees therefor," is a franchise tax, and not a tax on property. Said act is a valid constitutional law.

(Decided June 24, 1902.)

ERROR to the Court of Common Pleas of Franklin county.

The plaintiff in error, also plaintiff below, began an action in the court of common pleas in its own behalf, and in behalf of forty-four other corporations similarly situated, to recover from Lewis C. Laylin, secretary of state, money paid to him under duress and under protest accompanied with notice that an action would be brought for the recovery of the same, averring that payment was made to escape a heavy penalty imposed by the act known as the Willis law, passed April 11, 1902, entitled "An act to require corporations to file annual reports with the secretary of state and to pay annual fees therefor."

The petition avers that when the plaintiff was incorporated in 1901, it paid to the secretary of state as required by section 148a, Revised Statutes, twenty-five dollars, its charter fee, and two dollars, its certificate of subscription fee, and has listed all its property for taxation and paid said taxes, and it is now assessed for further taxation on all its property, and that it will pay such taxes when the same shall become due.

The said Willis law requires corporations to file an annual report in May of each year with the secretary of state, and to pay to him a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case.

The petition contains the following averments:

"Plaintiff is advised and believes, and therefore charges and avers that said defendant claims that such charge and exaction of one-tenth of one per cent. of the capital stock of said corporation and the additional charge and exaction of one-tenth of one per

cent. upon the subscribed or issued and outstanding capital stock of all of said corporations in behalf of which this action is brought, was and is a legal fee fixed by law and required to be made to the secretary of state under said act of the general assembly as above set out.

"Whereas, the plaintiff claims and will to the court insist, that this enactment is a statute merely attempting to levy a tax and raise a revenue for the general purposes of the state, and that the same was and is applied to plaintiff corporation and all other corporations organized under the laws of Ohio for profit wholly inoperative and void and is contrary to the constitution of the United States and the constitution of the state of Ohio."

The plaintiff prays that the secretary of state may be enjoined from paying said money into the state treasury, as the act requires him to do, and for a judgment in behalf of itself, and the other corporations for the recovery of said money so paid.

The secretary of state demurred to the petition, claiming that it does not state facts sufficient to warrant the relief prayed for.

The court of common pleas sustained the demurrer and dismissed the petition. On motion of plaintiff leave was granted to file a petition in error in this court, which was accordingly done.

Messrs. McCarthy & McDowell and Mr. Charles C. Upham, for plaintiffs in error.

From the above definitions as to what a tax is, we gather two necessary and predominant elements.

First—That it is levied upon all the property of a given class, and

Second—That it goes to the general revenue fund of the state.

This exaction is imposed upon the property of domestic corporations. It is levied upon the subscribed or paid up and outstanding capital stock of corporations.

What is *paid up capital stock* of a corporation but its assets? The general statute on this subject provides that the terms "Personal Property" shall be held to mean and include, second, "The capital stock, individual profits and all other means in forming part of the capital stock of every company," etc. Revised Statutes, Sec. 2730.

Section 2744, provides, that corporations shall list for taxation "All the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state at the actual value in money," etc.

Section 2746, provides, that stocks shall be listed by the person owning the same, but no person shall be required to list for taxation any share or shares of stock of any company when the same is taxed in the name of such company.

From the foregoing sections of the statute it is clear that the capital stock of a corporation is personal property, that it is subject to taxation, that it may be taxed either by levying the tax against the corporation itself or against the person owning the shares of stock, but that if it is paid by the corporation, it cannot then be levied against the person so owning the stock. These sections therefore clearly provide for the levying of a tax on the capital stock or property representing the same.

It has been held by this court that the personal property which a corporation, organized and doing business under the laws of this state, is required to list for taxation embraced the capital stock of the corporation, and such being the case, an owner of the shares of the capital stock of said company was not required to list his shares for taxation. *Jones v. Davis*, 35 Ohio St., 474.

Thus it will be seen that this law has both of the principal elements of a tax. We may conceive that taxes may be levied both on property and on occupation, but they must be so laid that they do not both fall directly upon the same property. This is laid down distinctly in *Cooley on Taxation*. In illustrating this doctrine he says: "To tax a merchant upon his stock as property, and also upon his gross sales, may be burdensome, but it is not unconstitutional when it is not expressly forbidden by the constitution. *The two taxes are not identical*, and though they may operate unjustly in particular cases, they are supposed to be imposed because the general result is equal and just." *Cooley on Taxation*, p. 385.

But how can it be said that the two taxes, the general tax against all corporate property levied under the general tax laws of this state, and the tax imposed by this act are not identical? If the capital stock of a corporation, and the property in which it is invested are identical, then one tax is laid upon the property and the other laid upon the capital stock, which is the same thing, constitutes double taxation. Constitution, Art. 12, Sec. 2; *Railway Co. v. State*, 49 Ohio St., 189.

The case of the *Railway v. State*, *supra*, we think, is absolutely decisive of the case at bar. *Ashley v. Ryan*,

49 Ohio St., 525; *Vandenbark v. Mattingly*, 62 Ohio St., 28; Constitution of Ohio, Sec. 4, Art. 13.

Suppose we concede, for the purpose of the argument that this law does not impose a tax upon property, but that it is a tax on the franchise, a charge for the privilege of doing business, then it is void under the holding in the *Bank v. Hines*, 3 Ohio St., 1.

Taxing by uniform rule requires uniformity in the mode of assessment upon taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. *Bank v. Hines*, 3 Ohio St., 15; *Cleveland Tr. Co. v. Lander*, 62 Ohio St., 272.

In the case of *McCurdy, Guardian, v. Prugh, Treasurer*, 59 Ohio St., 465, it is held that Sec. 2, Art. 12, of the constitution, provides for two things: First, the rule for fixing the rate of taxation; and second, the rule for valuing property.

It has been said that this court has already decided the question here raised, holding in substance that domestic corporations can be so taxed. We do not so understand the decisions of this court. In the case of *Express Co. v. State*, 55 Ohio St., 80, the court says that the question of so taxing a domestic corporation, is not before it.

This latter case also distinctly affirms the case of *Telegraph Co. v. Mayer*, 28 Ohio St., 521, which was a case arising upon the question of the right to tax *foreign corporations*.

In certain cases it has been held by this court that the state may impose a burden upon certain corporations and employments with a view to the protection of the health of the citizens or for the preservation of good order, or to secure the safety, convenience or

general welfare of the community, but that has only been done so far as domestic corporations were concerned, when the state, county or municipal corporation was put to some expense by reason of the management and control of said business or occupation. *Adler v. Whitbeck*, 44 Ohio St., 545.

Now in the act in controversy, what is there tending to show that the carrying on or the management of the various corporations in the state, are a burden to the general public?

And in all other cases where a tax, assessment or fee of this kind has been sustained, it has been upon the hypothesis of protecting the people or the public from increased burdens growing out of the carrying on of the various businesses, and in this connection we refer to the case of *The Gas Light & Coke Co. v. State*, 18 Ohio St., 238; *Telegraph Co. v. Mayer*, 28 Ohio St., 534; *Holst v. Roe*, 39 Ohio St., 340, and in the liquor cases, *Frame v. State*, 53 Ohio St., 311, and *Butzman v. Whitbeck*, 42 Ohio St., 223; and also this case of *Adler v. Whitbeck*, 44 Ohio St., 545.

In *Railway Co. v. State*, 49 Ohio St., 189, the Supreme Court in passing on the act of April 15, 1889, requiring every corporation or company operating a railroad or any part of a railroad within this state, to pay to the commissioner of railroads and telegraphs a fee of one dollar per mile, etc., the court says: "What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of one dollar per annum. The statute calls it a fee, but its nature is not affected by the name that may be assigned to it. * * * That it is such a tax, we think there can be little, if any, doubt. A tax is a pecuniary burden for the sup-

port of the government; burdens or charges imposed by the legislative power of state upon persons or property to raise money for public purposes." 2nd Bouvier, 705.

Now while it is true that act as passed on by the court at that time, was declared unconstitutional, because it was a tax on property to-wit:—a dollar for each mile of track, the doctrines laid down therein are entirely applicable to the case at bar.

Section 6 of this act is unconstitutional.

This section seeks, if it has any effect, to constitute a tribunal outside of the regular judiciary of the state, to try any questions that may arise in the application of this law. We think the legislature has no power to transfer from the regular judicial tribunals, the right to so try and determine these questions, and if it had, the law is eminently unfair, because it appoints as one of the judges of the tribunal, the attorney general whose duty it is to represent the state in such cases. *Zanesville v. Zanesville Telegraph & Tel. Co.*, 64 Ohio St., 67.

The holdings in other states are not by any means uniform. The most notable case probably in the books in recent years in favor of this law, is found in 118 Ala., 143. This case holds in substance, that the property of corporations may be taxed under the general laws of that state at the same rate as other property, and that an additional fee, assessment or tax may be laid on the capital stock of corporations. It is impossible to see how that could be done in Ohio, having in view the holding of this court, in *Jones v. Davis*, 35 Ohio St., 474. We do not see how the Alabama case can be reconciled with the holdings in this state.

Among the cases holding the opposite rule, and the one for which we contend, and with which the Ohio doctrine is reconcilable, we cite the following text and authorities supporting it: *Lewiston Water Power Co. v. Asotin Co.*, 64 Pac. Rep., 544; 24 Wash., 371; *People v. Badlam*, 57 Cal., 594; *Ridpath v. Spokane Co.*, 63 Pac. Rep., 261.

Mr. J. M. Sheets, attorney general, *Mr. A. Squire* and *Mr. John W. Warrington*, for defendant in error.

We maintain that the fee authorized by the act and complained of herein, is a charge upon the corporate franchise to do business or to operate according either to statutory powers conferred or to consent given through comity.

The title of the act shows a purpose to require corporations to "file annual reports with the secretary of state and to pay annual fees therefor," in addition to taxes on their ordinary property. The last paragraph of the first section requires the secretary of state to charge and collect in respect of domestic corporations for profit, "a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock." The last paragraph of section 2 requires the same official in respect of foreign corporations for profit doing business in Ohio, to "charge and collect * * * for the privilege of exercising its franchise in Ohio, annually, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio."

Consideration of this language cannot but satisfy every one that if we regard the fees thus authorized as a species of taxation even for revenue, the intent of the legislature was not to select a new object of taxation

except so far as it relates to a new class of corporations. The same object of taxation has been employed during many years for raising revenue, to-wit: corporate franchises and privileges. A change in class of corporations, or the inclusion of a greater number of corporations, cannot change the principle involved or the nature of the power exercised. The result is that the object of this class of taxation is not *property*; it is a franchise or privilege. It is not even capital stock in the sense of shares of stock. The corporation is not the owner of the shares; its stockholders are. *Leo, Treas., v. Sturges*, 46 Ohio St., 153.

It is settled that Sec. 2, Art. 12 of the constitution does not vest power to tax, but only prescribes a mode for the exercise of the power to tax *property*, and only that character of property which the section specifies. It is settled that the power of taxation abides in the legislative grant; and that there is no mode prescribed by the constitution for the taxation of objects other than property. *Ashley v. Ryan*, 49 Ohio St., 504; *Marmet v. State*, 45 Ohio St., 63; *State v. Ferris*, 53 Ohio St., 314.

But the decisions of this court extend further. They seem to us to cover and uphold the very kind of statutory charge or tax now in dispute. *Telegraph Co. v. Mayer*, 28 Ohio St., 521; *Hagerty v. State*, 55 Ohio St., 613, upheld the collateral inheritance tax act, which imposed a tax upon the right or privilege of receiving property by inheritance.

In *Express Co. v. State*, 55 Ohio St., 69, the doctrine was recognized, though it was not conceded to be directly involved, that the legislature might, in the exercise of the taxing power for general revenue, select a single business and impose upon the persons engaged

in it, an excise tax in addition to a tax upon their property, for the privilege of carrying on that business.

Express Company v. State, was recently approved and followed in *Car Line v. Guilbert*, 64 Ohio St., 614; *Insurance Co. v. New York*, 134 U. S., 594.

We beg to call attention to the entire opinion of Mr. Justice Field in that case. *Ashley v. Ryan*, 153 U. S., 436.

We may safely deduce from these decisions, all growing out of Ohio legislation :

First, that the old theory of property as defined in Sec. 2, Art. 12 of the constitution being the sole basis of taxation for general revenue, is obsolete and completely overthrown.

Second, that franchises and privileges received or enjoyed through either grant or comity of the state, are subject to conditions imposed by general law and are legitimate objects of taxation for general revenue. No distinction is made as to franchises or privileges received or enjoyed by domestic and foreign corporations; indeed, in the absence, as in the present statute, of legislative discrimination, it would be as irrational, to assert such a distinction, as it plainly would be, in the absence of legislative discrimination, to urge one between a citizen and a foreigner touching their liability respectively to a condition imposed as a tax upon the privilege to inherit or succeed to property.

Let us now examine some decisions rendered outside of Ohio upon legislative and constitutional provisions kindred to our own. *Cable Company v. Attorney General*, 46 N. J. Eq., 270.

It is evident that shortly after the passage of the annual tax or fee law in New Jersey, the same resistance was made to it as has been made here. The case last cited was decided in 1889. The question came up

in another form in 1892 before the New Jersey Supreme Court. *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L., p. 278.

The question was again before the Supreme Court of New Jersey in 1893, where another ingenious effort was made to escape the tax. *Bridge Company v. State Board of Assessors*, 55 N. J. L., p. 529; *Marsden Co. v. State Board of Assessors*, 61 N. J. L., 461; *Commonwealth v. Hamilton Manufacturing Co.*, 12 Allen, 298; *Commonwealth v. Cutter*, 13 Allen, 393; *Manufacturers Ins. Co. v. Loud*, 99 Mass., 146; *Commonwealth v. Bank*, 123 Mass., 493; *Railway Co. v. Board of Com'rs Brunswick Co.*, 72 N. C., 10; Clark & Marshall on Private Corporations, Vol. 1, Sec. 286 (b); *Scottish U. and N. Ins. Co. v. Herriott*, 109 Iowa, 606; *People v. Home Insurance Co.*, 92 N. Y., 328.

The analogy of this class of decisions is apparent when we consider that the claim there made was that a tax nominally upon the capital stock was a tax upon government bonds held by the corporation, while the claim here is that a similar tax is a charge upon the property of the plaintiffs. The complete answer there was, as we submit it should be here, that the tax is upon the franchise; and it is difficult to perceive any reason why such franchises should not be taxed, except only that through the grace of the state they have not been taxed. We may be permitted to adopt language here of Judge Fullerton, in *Monroe Savings Bank v. Rochester*, 37 N. Y., at page 365.

In Pennsylvania, the following have been held to be franchise taxes: Tax on a mining company measured by the number of tons of coal mined, *Coal Co. v. Commonwealth*, 79 Pa. St., 100; a tax on net earnings, even though a part of the earnings was derived from non-taxable securities, *Philadelphia Contributionship v.*

Commonwealth, 98 Pa. St., 48; a tax on capital stock as such, *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St., 251; a tax measured by dividends, *Phoenix Iron Co. v. Commonwealth*, 39 Pa. St., 104.

In *Glasgow v. Rouse*, 45 Mo., 479, it was held that the tax on income was a franchise tax, not a property tax, hence not in conflict with the provisions of the constitution of that state requiring taxes to be levied on property according to its true value in money.

In Massachusetts it is held that a tax of a certain per cent. on the capital stock of a corporation paid in is a franchise tax as distinguished from property tax. *Bank v. Apthorp*, 12 Allen, 252. Also a tax on savings banks measured by their deposits. *Commonwealth v. Bank*, 5 Allen, 428, and *Commonwealth v. Bank*, 123 Mass., 493. To the same effect see also, *Coite v. Society for Savings*, 32 Conn., 173.

This case was taken by writ of error to the Supreme Court of the United States. *Society for Savings v. Coite*, 73 U. S. (6 Wall.), 594.

In *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119, the court draws a distinction between franchise and property tax.

Corporations by the terms of the act in question are required to pay annually one-tenth of one per cent. on their capital stock. This is an imposition of a tax "according to nominal value." It matters not whether the stock is worth eight hundred (800) per cent. of its face value *e. g.* Standard Oil stock), or whether it is not worth one per cent. of its face value, the tax is the same, one-tenth of one per cent.

We wish to again suggest, the stock as such is not taxed at all. It is not taxed in the hands of its owners—the stockholders are its owners, the corporation is not. Reference is made to the capital stock, not as

descriptive of the subject to be assessed, but as furnishing a basis of computing the amount of tax to be paid by the corporation. The subject-matter to be taxed is the corporation, and the amount of capital stock furnishes the basis for computing the amount. *Hamilton Company v. Massachusetts*, 6 Wall., 632, is a case where the question as to whether the levying of a certain per cent. on the amount of deposits of a savings association was a franchise tax, or a property tax.

Plaintiffs' claim, at most, is that both their corporate property and franchises cannot be taxed; for, they say, this would be double taxation. Suppose that be true. What of it? Express companies have been assessed for years under the provisions of the Nichols law for their property taxes, R. S., Sec. 2777, 8, 9, 80; *State v. Jones*, 51 Ohio St., 492, and at the same time they have been compelled to pay an annual franchise tax of two per cent. on their gross receipts. R. S. Secs. 2780-1 to 6; *Express Co. v. State*, 55 Ohio St., 69.

It is unnecessary to remind this court of the fact that in appraising the express companies under the Nichols law the franchise to operate enters largely into the valuation. Indeed, the horses, wagons, safes, office fixtures, etc., constituting all the tangible property of these companies, would not amount in value to ten per cent. of the value as placed on them under the provisions of the Nichols law. They are appraised as a unit—as a going concern. The value of the stock is the criterion for their appraisal—not the value of the tangible property of the companies. Hence, of necessity, the value of the franchise to operate enters very largely into the assessment upon which the property tax is levied, and yet express companies must, in

addition thereto, pay two per cent. on their gross receipts as a franchise tax.

Companies required to pay a franchise tax of one-tenth of one per cent. on their capital stock under the provisions of the Willis law are appraised for their property taxes under the provisions of Sec. 2744, Rev. Stat. Hence, only their tangible property is assessed. Under this method of appraisement there are many corporations which are appraised at sums not to exceed one-tenth of the value as measured by the market value of the capital stock. The franchise to be a corporation of such companies is not considered in making their returns for taxation under the provisions of Sec. 2744. Hence, they cannot successfully maintain that the franchise to be a corporation has been taxed in any other manner than as provided in the act now under review.

Let it be understood, however, even if this were double taxation, they could not complain.

If it be claimed that the classification of corporations made in the act in question is a discrimination forbidden by the state and federal constitutions, *Express Co. v. State*, 165 U. S. 228; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232; *Pacific Express Co. v. Seibert*, 142 U. S., 339; *Kentucky R. R. Tax Cases*, 115 U. S., 321; *Home Insurance Co. v. New York*, 134 U. S., 594.

The policy pursued in Ohio is to classify its objects of taxation, when the nature of their use, or the nature of business engaged in, requires classification in the judgment of the legislature, in order to secure equality of the burdens of taxation, *e. g.* public service corporations are required to file with the auditor of state, annual reports exhibiting their gross earnings, and to pay a franchise tax of one per cent. of such gross earn-

ings. Insurance companies of every class, building and loan companies, etc., are required to file annual reports with the superintendent of insurance, and also to pay an excise tax. Hence it is apparent that the burden of excise taxes is fairly distributed among the corporations for profit operating within the state.

BURKET, J. The fee of one-tenth of one per cent. exacted from corporations in May of each year is an excise or franchise tax for general revenue. That such a tax may be constitutionally collected has been decided by this court in *Telegraph Co. v. Mayer*, 28 Ohio St., 521; *Express Co. v. State*, 55 Ohio St., 69; *State ex rel. v. Ferris*, 53 Ohio St., 314; and other cases, and is no longer an open question.

The state is a sovereignty and its powers are sovereign, except as limited and restricted by the constitution of the United States.

The grant of legislative power to the general assembly in section one of article two of the constitution is absolute, and is not limited in that section. The absolute and unlimited power of taxation is granted by that section to the general assembly, and the taxation may be upon franchises, privileges or property, as the general assembly may deem best; but when it comes to taxing property, there is a limitation placed upon that power by sections one, two and three of article twelve of the constitution, and by section four of article thirteen of the same instrument. By section one of article twelve, a limitation prohibits the levying of a poll tax for county or state purposes. By section two of the same article, all taxable property, real and personal, is required to be taxed by a uniform rule as its true value in money. By section three all property employed in banking is required to

bear a burden of taxation, equal to that imposed on the property of individuals; and by section four of article thirteen, property of corporations is subject to taxation the same as the property of individuals. These are very important limitations upon the power of taxation of property granted by said section one of article two of the constitution, and are intended to secure uniformity and equality in taxation on property.

But upon the power to tax privileges and franchises there is no express limitation in the constitution, but certain limitations upon that power must be implied from other provisions of the constitution, so as to make the whole instrument harmonious and consistent throughout. The constitution was established to "promote our common welfare." Preamble to the constitution. Government is instituted for the equal protection and benefit of the people. Section two of the bill of rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section nineteen of the bill of rights. These provisions of the constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley v. Ryan*, 49 Ohio St., 504; *State ex rel. v. Ferris*, 53 Ohio St., 314, and *Hagerty v. State*, 55 Ohio St., 613, are examples of taxing the privilege or franchise conferred; while *Telegraph Co. v. Mayer*, 28 Ohio St., 521, and *Express Co. v. State*, 55 Ohio St., 69, are examples of taxing the continued value of the existing privilege or franchise from year to year.

These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the com-

mon or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts.

A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment, the public first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred. *Walsh v. Barron*, 61 Ohio St., 15. A foreign corporation can do business in this state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. It therefore follows that a franchise tax may be imposed on both domestic and foreign corporations alike.

An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held by artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in *Adler v. Whitbeck*, 44 Ohio St., 539, and was there applied to the liquor traffic, because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals.

It is urged, and truly, that the capital paid in by the stockholders becomes invested in property, and that taxes are paid thereon the same as individuals pay upon their property. Then it is urged secondly that this exaction of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock, is an additional tax on the same property or capital, and that thereby double taxation results. But this second proposition is not true, because the exaction of one-tenth of one per cent. is not a property tax on property owned by the corporation, but is an excise tax the amount of which is fixed and measured by the amount of subscribed or issued and outstanding capital stock. To constitute double taxation, both taxes must be property taxes, and both on the same property. Here one tax is a property tax, and the other an excise or franchise tax, and therefore there is no double taxation.

The limitation in section four of article thirteen of the constitution, which prohibits double taxation of the property of corporations, applies only to taxation on property, and not to taxation of privileges or franchises. What is said in *Cleveland Trust Co. v. Lander*, 62 Ohio St., 266, as to that limitation, is solely as to property taxation. That section of the constitution plainly shows that it applies to property taxation only, and has no reference to excise, or franchise taxes. The section is as follows: "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals."

The stock of a corporation is not its property, and is not owned by it, but by the several stockholders. It *owes* and not *owns* the stock. The stock is a liability of the corporation, and not an asset; and being a lia-

bility it cannot be taxed, because in property taxation the tax must be upon the true value in money, and a liability can have no such value. So that, this exaction of one-tenth of one per cent. is not a tax against the corporation on stock owned by it, but is a franchise tax the amount of which is fixed and graded by the amount of subscribed or issued and outstanding capital stock.

In *Railway Co. v. State*, 49 Ohio St., 189, it was held that an act requiring a fee of one dollar per mile of track to be paid by every corporation operating a railroad in this state, was unconstitutional, as being in conflict with sections two and five of article twelve of the constitution; and it is urged that as that fee or tax of one dollar per mile in addition to the general taxes paid on the railroad was unconstitutional, this fee or tax of one-tenth of one per cent. on the stock is also unconstitutional. But that does not follow. The track of the railroad was property, and was owned by the company, and the one dollar per mile was a tax on property, and was in addition to the general tax paid on the true value in money, and was more than on property of individuals, and was therefore in conflict, not only with said section two of article twelve of the constitution, but also in conflict with said section four of article thirteen of the same instrument. But in the case at bar the tax is not a property tax, and the stock is not owned by the corporation, as already explained, and therefore the case of *Railway Co. v. State*, is not like the case at bar, and does not rule the same.

The tax of one-tenth of one per cent. on the amount of the subscribed or issued and outstanding stock, is not unreasonable, and does not appear to be above the continuing value of the franchise of corporations from

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year to year, and is therefore within the clear power of such taxation by the general assembly.

The act in question is not void for uncertainty as urged by counsel, but is in all respects a valid and constitutional statute.

Judgment affirmed.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

THE STATE OF OHIO EX REL. FENSELL v. ALDRIDGE,
AUDITOR, ET AL.

Apportionment of valuation of railway property—Sec. 2774, Rev. Stat.—How property belonging to railroad division should be apportioned among counties—Taxation of rolling stock—How determined by county auditors—Minutes of a taxing board not conclusive—Real facts may be shown by parol—Taxation of property—Law of evidence.

1. The words, "belongs to * * * any one of such divisions or branches," in section 2774, Revised Statutes, has reference to cases in which a division or branch of a railroad is separately equipped; and in such cases its rolling stock, while owned by the company, is regarded as belonging to such division or branch for operating purposes, and the value thereof is required by said section to be apportioned for taxation, among the counties through, or into, which the track of said division or branch extends.
2. If the rolling stock does not so belong to a division or branch, but is used solely thereon, the value thereof is required by said section to be apportioned for taxation, the same as if such rolling stock so belonged to said division or branch.
3. The value of so much of the rolling stock as does not so belong to the main line or to a division or branch, and is not solely used thereon, is required by said section to be apportioned for taxation among all the counties, through, or into, which the road extends, in the same proportion that the length that such road in each county, bears to the entire length thereof in all said counties, including main line, divisions and branches.

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4. In apportioning the value of rolling stock, the board composed of the county auditors, should first ascertain the value of the rolling stock which belongs to, or is used solely on the main line, division or branches, and then ascertain the value of all the other rolling stock, and then apportion their valuations upon a mileage basis as required by said section 2774.
5. The minutes of a taxing board are not conclusive, and the real facts may be shown by parol, unless otherwise provided by statute.

(Decided June 24, 1902.)

IN MANDAMUS.

The Cleveland and Pittsburg railroad has a "Main Line," a "River Division," and a "Tuscarawas Branch." The railroad is operated by the Pennsylvania Company, and part of the rolling stock belongs to or is used solely upon said main line, part on said river division, part on said Tuscarawas branch, and the remainder belongs to and is used generally and indiscriminately upon the whole road including the division and branch.

On May 10, 1901, the auditors of the different counties through, or into which said railroad and its division and branch pass, met at the city of Cleveland in compliance with sections 2770 to 2776, Revised Statutes, to fix and apportion the taxable valuation of said railroad as required by said sections. The rolling stock was appraised by said board at seven thousand dollars per mile, and the amount for rolling stock was apportioned by the secretary of the board of auditors, 77 per cent. to the main line, 19 per cent. to river division, and 4 per cent. to Tuscarawas branch, and the amounts arising from these per cents were apportioned to the respective counties upon a mileage basis according to the number of miles of track in each county.

The auditor of Tuscarawas county claimed that this percentage apportionment of the value of the rolling stock was in violation of the provisions of section 2774, Revised Statutes, and filed his petition in mandamus in this court, against the auditors of all the other counties composing said board of appraisement, praying that writs of mandamus might issue commanding said auditors and said board to again meet and distribute and apportion the valuation of said item of rolling stock in the proportion that the total length of the main track of said road in said county of Tuscarawas bears to the entire length thereof in all of said counties.

The auditor of Jefferson county by cross-petition prayed first that the apportionment be made according to law, and then prayed that the valuation of the rolling stock be distributed in proportion that the total length of the main track in Jefferson county bears to the entire length thereof in all of said counties.

The auditor of Belmont county in a cross-petition in behalf of his county joined in the prayer for like relief. The auditor of Carroll county by cross-petition in behalf of his county also asked for a redistribution and apportionment as provided in said section 2774.

The auditors of the counties of Columbiana, Cuyahoga, Portage and Summit filed a joint answer in which they claimed the apportionment upon said percentage basis to be lawful and prayed judgment accordingly.

It is claimed by those in favor of the percentage basis of distribution, that that method of distribution was ordered by the board at its meeting, and the minutes of the secretary bear out this claim. On the other hand it is claimed that only the valuation of the roll-

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ing stock was fixed by the board, and then the secretary was to make inquiry as to the legality of distributing by a percentage basis, and make such distribution if found to be legal, and that the secretary found such method to be legal and made the distribution accordingly. The master to whom this case was referred finds this latter contention to be true, and that the minutes of the secretary do not correctly state what actually occurred at the meeting.

Mr. John M. Sheets, attorney general, *Mr. J. F. Greene* and *Mr. V. H. Mowls*, for relator.

Mr. P. H. Kaiser and *Mr. R. M. Wanamaker*, for defendants.

BURKET, J. The statute which governs the apportionment of the value of the rolling stock of a railroad among the several counties for purposes of taxation is section 2774, Revised Statutes. That section is as follows:

"Section 2774. The value of such property, moneys and credits, of any railroad company, as found and determined by such board, shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, so that to each county and to each city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures, and stationary personal property of such railroad company in this state; and so that the rolling stock, main track, roadbed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in such county bears to

the entire length thereof in all said counties or county, and to each city, village, and district, or any part thereof therein, provided that if the line of any railroad company is divided into separate divisions or branches, so much of the rolling stock of such company as belongs to or is used solely upon any one of such divisions or branches shall be apportioned in the same manner to the county or counties, and to each city, village and district, or any part thereof therein, through which such branch or division runs, and the board shall certify to the county auditor of each county, and to each city, incorporated village, township and district, or any part thereof therein interested, the amount apportioned to his county, and the board shall make and forward a like certificate together with all the reports of the various railroad officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state, for the use of the state board of equalization of railroad property. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof; but the auditor shall not put the same on the tax list until he shall have been advised of the action of said state authority, when the proper amounts shall be entered on the tax lists."

It is conceded on all hands, and found by the master as a fact, that the railroad in question has a main line, a river division and a Tuscarawas branch, and that part of its rolling stock is used solely upon the main line, part on the river division and part on the Tuscarawas branch, and the remainder of the rolling stock is used indiscriminately upon the whole road including the division and branch.

The above section of the statute requires the board of appraisers to apportion to the main line the value of the rolling stock which belongs to, or is used solely thereon, and to the river division the value of the rolling stock which belongs to, or is used solely upon that division, and to the Tuscarawas branch the value of the rolling stock which belongs to, or is used solely on that branch, and then to ascertain the value of the remaining rolling stock, the whole valuation being seven thousand dollars per mile, and distribute and apportion the value of this remaining rolling stock among the counties according to the number of miles of track in each, whether such track be main line, division or branch. The value of the rolling stock which belongs to, or is used solely on the main line is required to be apportioned among the counties through or into which the main line passes according to the number of miles of such track in each county, and the same rule applies to the division and branch.

A division or branch cannot separately own any part of the rolling stock, because all the rolling stock is owned by the company; but it often occurs that a branch or division is constructed, equipped and financed by itself, and separate books and accounts kept of the earnings, running expenses, equipage, interest, bonds, etc., and in such cases the rolling stock, while owned by the company, is regarded as belonging to such branch or division for operating purposes, and in such cases its value is required by said section 2774, to be apportioned to the counties through, or into, which the track of such branch or division passes, according to the number of miles of track in each county.

If there is no such separate construction, equipage or accounts, but still certain parts of the rolling stock

are used solely upon such division or branch, the same result would follow as if such rolling stock, belonged in the above sense, to such division or branch. But if none of the rolling stock so belongs to any division or branch, and is not used solely thereon, then the whole value of the rolling stock upon the whole road is, by said section, required to be apportioned among all the counties according to the number of miles of track in each, whether main line, division or branch.

While it does not positively appear from the facts found by the master, that any injustice was done in the apportionment made by the board upon such percentage basis, it clearly appears that the apportionment was made upon a wrong and unlawful basis, and that in all probability injustice was done, as it is not likely that a correct result would arise from a wrong basis or method.

It is urged that the minutes of the meeting of the auditors is a record conclusive in its nature, and that proof cannot be received to show the real facts, as such proof would be contradicting the record. This claim is not tenable. In matters of taxation the real facts may be shown even though such facts add to or contradict the record of a taxing board. *Lewis v. State ex rel.*, 59 Ohio St., 37; *Hagerty v. Huddleston et al.*, 60 Ohio St., 149.

A writ of mandamus will therefore be awarded commanding the auditors of the several counties through, or into which said railroad passes, to reassemble and as a board apportion the valuation of seven thousand dollars per mile among said counties by the method and upon the basis, as required by said Sec. 2774 as above construed.

Writ of mandamus awarded.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

VAN ETTEN ET AL. v. KELLY.

Oil lease requiring certain wells—To be completed within stated time—Otherwise to become void unless second party make monthly payment—Does not constitute obligation to pay rental—Action for recovery of rentals will not lie, when.

An oil lease which required certain wells to be completed within stated times, contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed." Held, that this did not constitute a promise or obligation to pay rental; and held further, that the lessee had the option to complete wells, or pay rentals, to keep the lease alive; and that upon breach of the agreement to complete wells, no action would lie for the recovery of rentals.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Wood county.

The action in the court of common pleas was for the recovery of rental claimed to be due under the terms of an oil lease made by Luceba A. Kelly to one Scott Blair. The following is a copy of the lease except signatures:

"In consideration of the sum of one hundred dollars, the receipt of which is hereby acknowledged, Luceba A. Kelly, first party, hereby grants unto S. Blair, second party, his successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas or water; to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas or water taken from said premises. Excepting and re-

serving, however, to first party the one-sixth part of all oil produced from said premises, to be delivered in the pipe line with which second party may connect its wells, namely:

All that certain lot of lands situated in the township of Freedom, county of Wood, in the state of Ohio, bounded and described as follows: to-wit:

The south half ($\frac{1}{2}$) of the northwest quarter of section No. twenty (20), town five (5), range twelve (12) east, containing eighty acres, more or less.

To have and to hold the above premises on the following conditions:

If gas only is found second party agrees to pay three hundred dollars each year for the product of each well, while the same is being used off the premises, and the first party to have gas free of cost to heat three stoves in dwelling house during the same time.

Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops by reason of removing and burying said pipe lines, or in drilling said wells.

No well shall be drilled nearer than 300 feet to the house or barn on said premises, and no well shall occupy more than one acre.

In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed. Payable at first party's residence.

The second party shall have the right to use sufficient gas and water to run all necessary machinery for operating said lease, and also the right to remove all its property at any time.

The east forty acres of said land shall be drilled first. Second party agrees to complete a well every sixty days from date hereof on said east forty acres until six wells are completed including the first well and all lines must be protected. Second party further agrees to complete a well every ninety days on the west forty after the completion of the sixth or last well on the east forty acres. It is understood that the monthly rental shall apply to any well or wells not completed as herein specified.

It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns. This lease to be void after fifteen years from date hereof.

In witness whereof, the parties have hereunto set their hands and seals this 15th day of September, A. D. 1896."

Neither the lease nor any transfer of any interest therein was ever recorded.

After stating in proper form the making of said lease and its terms and conditions, the petition of the said plaintiff below, Luceba A. Kelly, proceeds as follows:

"That said Blair on said 15th day of September, 1896, took said lease in his own name, but in fact for and on behalf of defendants, excepting and reserving one-eighth interest in and to said lease which was owned by said Blair and afterwards the defendant, Henry Bowlus, purchased the said interest therein belonging to said Blair.

"That said lease is held and owned by said defendants under and subject to all the terms and conditions in said lease therein mentioned and read, and that said defendants and each and every one of them

in accepting said lease, and operating same, as hereinafter alleged, have become liable to the payment of any moneys there may be due as rental of said lands. That according to the terms of said lease, the said defendants did drill the first well upon the east forty acres of said premises and completed the same within the time provided for in said lease. And sixty days thereafter they, the said defendants, did drill and complete another well on said east forty (40) on said premises. That according to the terms of said lease in the month of March and on the 15th day of said month, 1897, there should have been another and third well completed on the said east forty acres on the said lands.

"To complete said third well the defendants each and every one of them have wholly failed, refused and neglected to do, and thereupon and thereby they became and are liable to the payment of said sum of thirty (\$30) dollars per month as long as the completion of said third well is delayed.

"And the said plaintiff further says that for the last five months past said defendants have wholly failed and refused to operate the wells they have so drilled and have failed to operate the same so that this plaintiff has received no benefit therefrom.

"Yet the said defendants have failed, refused and neglected to either cancel said lease or operate said wells or pay said rental.

"Wherefore said plaintiff prays that she may have judgment against said defendants for the sum of three hundred and ninety (\$390) dollars together with interest thereon, as follows:"

Then follow installments of rental, amounting to \$390 with interest.

The defendants below in their answer denied substantially all the averments of the petition, and plead that oil in paying quantities could not be produced on said premises, and that after ascertaining that to be so, they had offered to surrender and cancel the lease, and also averred that by a proper and fair construction of said lease the defendants below, plaintiffs in error here, were not required to pay any rental whatever to the plaintiff, by reason of the failure to drill said wells, or for any other cause. The reply denied the averments of the answer.

Upon the trial the evidence tended to show that Scott Blair took said lease in behalf of himself and the other defendants, except Henry Bowlus, who came in later; that they so understood the matter, accepted the lease, and drilled the two wells thereunder. That Henry Bowlus purchased the interest of Scott Blair after default had been made in completing the third well.

The plaintiff below recovered a verdict against all the defendants for \$390. A motion for a new trial was made and overruled, and judgment entered on the verdict.

The circuit court affirmed the judgment, and thereupon the plaintiffs in error came here, seeking to reverse the judgments below.

Mr. John S. Hoyman; Messrs. Baldwin & Harrington and Mr. James O. Troup, for plaintiffs in error.

Mr. Peter Emslie, for defendant in error.

BURKET, J. The only question worthy of report is, as to the true construction of the oil lease in regard to the payment of rentals. All the terms and conditions of the lease in that regard are the following: "In case no well is completed within thirty days

from this date, then this grant shall become null and void, unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed. * * * It is understood that the monthly rental shall apply to any well or wells not completed as herein specified."

It was in said lease specified that a well should be completed every sixty days from date of lease on east forty acres until six wells should be completed thereon, and that a well should be completed every ninety days on the west forty, after the completion of the sixth well on the east forty.

A well was completed on the east forty within thirty days after the date of the lease, and as to that well there was full performance, and the lease was thereby saved from forfeiture, as to the first well. The same is true of the second well. But no third or other well was ever completed, and thereby the agreement in the lease as to completing such other wells, was broken, and now the question arises as to the remedy for such breach of contract.

The plaintiff below claims that in the words, "unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed," there lies a promise to pay thirty dollars per month for such delay. This is not tenable. The full force and effect of this "unless" clause, taken by itself, is, to give the lessee the option by making such payment to continue the lease in force to the end of the term without completing the first well, or upon failure to make such payment, allow the lease to become null and void at the end of thirty days after the date of the lease. *Brown v. Fowler*, 65 Ohio St., 507.

There is no promise or obligation in this lease to pay rental to the lessor for failing to complete the first well, but only a privilege to pay such rental at the option of the lessee to prevent the lease from becoming null and void.

As the only monthly rental provided for in the lease is that found in this "unless" clause, and as that rental is to prevent the lease from becoming null and void, it seems fairly clear that the subsequent understanding that the monthly rental should apply to any well or wells not completed as therein specified, is for the same purpose, that is, to prevent the lease from becoming null and void, and that upon failure to pay such monthly rental in advance while the completion of any well was so delayed, the lease by its terms became null and void, and the lessor had the option to so treat the lease, and recover possession, or recover for use and occupation, or recover damages for breach of contract to drill the wells specified in the lease, but she could not recover rentals for breach of contract to complete wells, because there is no agreement to pay rentals for such breach, and there being no such agreement, there can be no breach thereof.

In *Woodland Oil Co. v. Crawford*, 55 Ohio St., 161, the lessee agreed to drill certain wells and upon failure, to pay certain rentals. It was held that the lessor might elect to enforce the contract to drill, or waive that, and enforce the promise to pay rental. There the option was with the lessor. Here, as there is no promise to pay rental, the option is with the lessee, either to drill or pay rental to keep his lease alive, and failing in both, the lease becomes null and void, with an option however in the lessor to treat it

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as void, or to sue for damages for breach of the contract to complete the wells as specified in the lease.

As the action below was for the recovery of rentals under the lease, and as the lease contains no promise to pay rentals, the plaintiff under a correct construction of the lease has no cause of action for rentals, and the judgments of the lower courts must therefore be reversed and petition dismissed, but without prejudice to the bringing of such other action for the breach of said contract to complete wells, as may be authorized by law.

Judgments reversed and judgment for plaintiff in error.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

STATE OF OHIO EX REL. TRAUGER v. NASH, GOVERNOR.

Mandamus of the governor—To fill office of lieutenant governor—A private citizen may be the relator in such proceeding—Duty and power of appointment conferred by legislature—Art. 2, Sec. 27, Const.—Such function not executive but ministerial—Sec. 81, Rev. Stat.—Term of office of such appointee, Sec. 11, Rev. Stat.

1. The attorney general not having become such, a private citizen may be the relator in a mandamus proceeding to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large.
2. In such case a writ of mandamus may issue against the governor commanding him to perform a purely ministerial act; but not to control his discretion in the performance thereof. *State ex rel. Whiteman et al. v. Salmon P. Chase, Governor*, 5 Ohio St., 528, approved and followed.
3. The duty and power of making appointment to fill a vacancy in the office of lieutenant governor is not specially conferred on the executive branch of the government by the constitu-

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tion, and rests wherever the legislature may vest it. (Article 2, Section 27.) Such duty being imposed on the governor by statute, it is not an executive function but is a ministerial duty.

4. There is no provision in the constitution for filling a vacancy in the office of lieutenant governor, except as authorized under section 27, article 2; and when such vacancy occurs it must in all cases be filled by appointment by the governor as provided in Revised Statutes, section 81.
5. The term of office of such appointee shall be for the unexpired portion of the term and until his successor is elected and qualified as provided in Revised Statutes, section 11; and "the first proper election" is the first election at which a lieutenant governor would have been chosen had no such vacancy occurred.

(Decided June 26, 1902.)

IN MANDAMUS.

This action is on a petition in mandamus filed by leave of the court. The petition is as follows:

The relator says that he is an elector, citizen and taxpayer of, and the owner, in fee simple, of real estate in, the city of Columbus, state of Ohio.

That the defendant, George K. Nash, is the duly elected, qualified and acting governor of the state of Ohio.

The relator further says that Carl L. Nippert was, on November 5, 1901, duly elected to the office of lieutenant governor of the said state of Ohio; that on January 13, 1902, he duly qualified as such lieutenant governor and entered upon the discharge of the duties of said office and continued in the said office and in the discharge of said duties until May 2, 1902, when he duly resigned from said office; that by reason of said resignation a vacancy arose in said office of lieutenant governor, which vacancy still continues to exist.

That it is the duty of the said defendant, George K. Nash, as such governor, enjoined upon him by force of Secs. 11 and 81 of the Revised Statutes of Ohio, to appoint an elector of the state of Ohio to fill said vacancy in the office of lieutenant governor, to hold the same until his successor is elected and qualified.

The said defendant, George K. Nash, governor as aforesaid, entertaining doubts with respect to his duty in the premises, neglects, declines and refuses to, and declares that he will not, fill said vacancy by appointing an elector to said office.

The relator says that by the ordinary course of the law he has no adequate remedy against the said defendant for so refusing.

Wherefore the relator prays that the defendant, George K. Nash, governor of the state of Ohio, may be compelled to appoint an elector of the state of Ohio to the office of lieutenant governor to hold the same until his successor is elected and qualified, by mandamus from this court; that an alternative writ of mandamus may first issue requiring the defendant to show cause, by a day to be named therein, why he does not appoint the same, and that on final hearing a peremptory writ of mandamus may be awarded to compel the defendant to appoint an elector to said office of lieutenant governor; and for such other and further relief as the nature of the case may require.

The issuing and service of an alternative writ of mandamus was waived and appearance entered by the defendant who filed a demurrer to the petition for the reason that the same does not state facts sufficient to warrant the relief prayed for.

Mr. George B. Okey and Mr. Otway J. Cosgrave,
for the relator.

Mr. J. M. Sheets, attorney general, and *Mr. J. E. Todd,* assistant attorney general, for defendant.

Mr. W. H. West, as *amicus curiae*, filed a brief.

DAVIS, J. It is to be regretted that the defendant did not see fit to answer, as has been sometimes done in like cases before, submitting the question of law to the court and expressing a willingness to abide by its decision. Such a course would have relieved us from some embarrassing considerations; but the case is before us on demurrer to the petition, and, in addition to the main question, it is urged by the attorney general, who appears as counsel for the defendant, first, that the relator has no such beneficial interest in the act which he seeks to have performed as entitled him to apply for a writ of mandamus, and second, that the court has no "power" to require the performance of an official act by the governor of the state.

Concerning the first proposition of the attorney general, it may be conceded that a majority of the courts which have pronounced opinions on the subject, have held that a private relator applying for a mandamus must show a special interest in himself; but even in some of those jurisdictions it has been said that "the rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law." *Ayres v. Board of State Auditors*, 42 Mich., 422, 429. And in the same case, pages 429-430, the court made the following observations which are very pertinent here: "In the present case the officer whose duty it usually is to enforce the rights of the state, in this court, has, in the perform-

ance of his official functions as adviser of the state officers, placed himself in an adverse position, and appears for the respondents on this application. Inasmuch, then, as the attorney general refuses to appear and seek the enforcement of the statutory provisions, does his refusal preclude its enforcement? And if not, is the relator authorized to bring the matter before this court? There may perhaps be others who have interests that would justify their appearance, but there is no one else whose duty it is to appear when the attorney general declines to do so. * * *

There are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed unless under circumstances when the public injury by its refusal will be serious. * * *

But we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases concerning the relief as well as other questions." In *Railroad Co. v. Hall et al.*, 91 U. S., 343, the court say: "There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." The same ruling was made in *Railroad Co. v. Suffern et al.*, 129 Ill., 274; and in *State ex rel. Currie et al. v. Weld, County Auditor*, 39 Minn., 426; see *High on Extraordinary Remedies*, (3 ed.) Sec. 431. The right of a citizen to enforce a public right, without the intervention of the attorney general, has been established in this state in two cases, viz.: *State v. Brown*, 38 Ohio St., 344; *State ex rel. v. Tanzey et al.*, 49 Ohio St., 656.

We now come to the attorney general's second contention, that is, that "this court has no power to require the performance of an official act by the governor of the state." If reference is here made to the physical power to enforce obedience to the writ, we will say that we are not concerned with that suggestion. We will assume that the governor is just as ready to respect the law, and the mandates of the courts, as any other officer who has taken an oath to support the constitution and to faithfully perform the duties of his office. If this expression is intended as a denial of our jurisdiction or of our duty to issue a writ of mandamus against the governor in a proper case, we pause long enough to state our reasons for holding to the contrary view. First, the judges of this court, after argument by eminent counsel on both sides, were unanimous in the conclusion that in regard to a ministerial act, which might have been devolved on any other officer of the state, the governor might be made amenable to the compulsory process of this court by mandamus, *State ex rel. Whiteman et al. v. Chase, Governor*, 5 Ohio St., 528; and on consideration now we see no sufficient reason for overruling that decision. While there is irreconcilable conflict in the opinions on this subject, we think that the better reasoning is found in those cases which reach the conclusion that a writ of mandamus may be directed to the governor, or any other officer, to compel the performance of clear legal and mandatory duties. See cases collected in 6 Am. & Eng. Enc. Law, (2 ed.) 1013. See also, dissenting opinions in *State ex rel. v. Board of Canvassers*, 17 Fla., 9; *People v. Morton et al.*, 156 N. Y., 136.

The legislative, executive and judicial departments of the state government are not so absolutely dis-

tinct that an arbitrary exercise of power, or what is the same thing, an arbitrary refusal to exercise power, could not be checked or opposed by either of the other departments. Such a theory is opposed to the principle of checks and balances upon which the federal and state constitutions have been framed. Indeed, it does not seem clear to us, if the judicial department may annul an act of the legislature by declaring it unconstitutional, why it may not constitutionally exercise its functions in requiring the executive department to perform a clear legal duty which it neglects or refuses to perform. Neither are we ready to acknowledge that any office or officer is so high that the law cannot reach him.

And now it is necessary to define more distinctly what are ministerial duties and ministerial acts. Perhaps no better definition can be found than that given by the Supreme Court of Indiana in *Flournoy v. Jeffersonville*, 17 Ind., 169, which is as follows: "A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." Assuming for the present purpose that the duty of the governor to act when a vacancy occurs in the office of lieutenant governor, is found in Revised Statutes, Sec. 81, it is clear that the duty thus imposed is mandatory. The governor is allowed no discretion as to acting, however much discretion he must necessarily exercise in selecting the person whom he shall appoint. It is equally clear, we think, that this power is not essentially an executive function, but is derived wholly from the com-

mand of the statute, and that under the constitution, Art. 2, Sec. 27, the legislature might, just as lawfully, have imposed the duty on some other officer; for the appointment of all officers and the filling of all vacancies, not otherwise provided for in the constitution, shall be made in such manner *as may be directed by law*. The power to appoint officers does not inhere in the office of governor. When no such power is conferred on the governor by the constitution or by a valid enactment by the legislature, he cannot exercise such power. The power to appoint to fill a vacancy has been delegated by the people to the legislative branch of the government, and that branch has by law "directed" the governor to perform it. It becomes, therefore, a purely ministerial duty to appoint. *Fox v. McDonald*, 101 Ala., 51; *Mayor, etc., v. State*, 15 Md., 376; *Hovey, Governor, v. State ex rel.*, 119 Ind., 395; *People v. Freeman*, 80 Cal., 233; *State v. George*, 22 Ore., 142.

The substance of this proceeding appears to us to be confined within a very limited compass. We are not disposed to speculate upon imaginary cases, nor to indulge in discussion concerning contingencies for which, possibly, sufficient provision may not have been made. We are content to dispose of the case presented to us, and to dispose of it according to the parts of the constitution, and of the statutes which are pertinent to it, without resolving ourselves into a legislature or a constitutional convention. We find no provision in the constitution specifically providing for filling a vacancy in the office of lieutenant governor. It is argued that the words "until the vacancy is filled" refer to a vacancy in the office of lieutenant governor. If that construction is correct, and we

are inclined to think that it is not, still it is not provided how or by whom the vacancy shall be filled. The only provision in the constitution controlling the case in hand is the one already adverted to, Art. 2, Sec. 27; and the legislature having, by a plain, unambiguous and mandatory enactment, directed the governor to fill the vacancy by appointment it is in our judgment his clear duty to do so.

Another point which appears to be involved is the term of office of the appointee. Revised Statutes, Sec. 11, reads as follows: "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy. * * *." The phrase "the first proper election" was construed in *State v. Barbee*, 45 Ohio St., 347, to mean the first election appropriate to the office, that is, the election at which such officers are regularly and properly elected. It seems, from a study of the constitution, Art. 3, Sec. 18, that the office of lieutenant governor was omitted therefrom because, for obvious reasons, it was desired to have the term of office of the lieutenant governor begin and end at the same time with the term of office of the governor, and that the last clause of that section of the constitution would defeat that purpose, if the office of lieutenant governor was named therein. From these considerations we are of the opinion that the appointee should be appointed for the unexpired portion of the term of Lieutenant Governor Nippert, and that he should hold until his successor is elected and qualified as provided in Revised Statutes, Sec. 11; and that the first

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proper election for his successor is the first election at which a lieutenant governor would have been chosen had no such vacancy occurred. The demurrer to the petition is overruled and

Peremptory writ awarded.

BURKET, SPEAR and PRICE, JJ., concur.

SLINGLUFF ET AL. v. WEAVER ET AL.

Jurisdiction of Supreme Court in error—Act of May 12, 1902, to define same—Object of judicial investigation to ascertain intent of legislature—Method of consideration—Intent to be sought in the language employed—Meaning if plainly expressed to be enforced without reference to intention—Validity of Royer act—Interpretation of law.

1. The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.
2. But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.
3. The language of the act of May 12, 1902, entitled, "An act to amend section 6710 (as amended 93 O. L., 255) of the Revised Statutes," is plain and free from doubt, and effect must be given to its clear import without regard to the consequences which may result. Its effect is to deprive this court

66	621
67	146
167	148
67	244
66	621
66	691
66	621
169	365

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of jurisdiction to review any case in error where the judgment of the lower court has been or may be rendered since the passage of the act, and not coming within its terms.

4. This court is without jurisdiction to review a judgment of the circuit court rendered June 6, 1902, in a cause in injunction, commenced in the court of common pleas June 2, 1902.

(Decided June 26, 1902.)

ERROR to the Circuit Court of Tuscarawas county.

MOTION TO DISMISS.

The action below was brought June 3, 1902, by plaintiffs in error, residents and taxpayers of the village of Dover, Tuscarawas county, to enjoin the mayor and council of said village from granting a franchise to certain persons for the use of an electric railway company, to build its track and operate an electric railway upon and over a certain bridge across the Tuscarawas river and the Ohio canal in said village. A demurrer to the petition was sustained by the common pleas and the petition dismissed. The cause being appealed to the circuit court, that court, June 6, 1902, made a like holding and entered a like judgment. The proceeding in this court is to obtain a reversal. The motion now submitted by the defendants in error is to dismiss the cause and strike it from the docket upon the ground that the court has no jurisdiction to review the judgment of the circuit court.

Mr. Amos Ruff, Mr. Joseph H. Mitchell and Messrs. Welty & Albaugh, for the motion.

Mr. George B. Okey, also filed a brief in support of the motion.

Messrs. Wilkin & Wilkin, contra.

Mr. A. T. Brewer and *Mr. Samuel Hambleton* were also heard in oral argument against the motion, and *Mr. W. B. Sanders* and *Mr. C. T. Brooks* each presented a brief in opposition.

SPEAR, J. The proposition of the counsel appearing for the motion is that, by force of the act of May 12, 1902, amending Sec. 6710 of the Revised Statutes, this court is without jurisdiction to entertain the cause and review the judgment of the circuit court. That act is as follows:

"An act to amend section 6710 (as amended 93 O. L., 255) of the Revised Statutes of Ohio.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. That section 6710 (as amended 93 O. L., 255) of the Revised Statutes, be amended so as to read as follows:

"Section 6710. A judgment rendered, or a final order made, by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court, or a judge thereof, may be reversed or modified by the supreme court, on petition in error, for errors appearing on the record, in any case in *quo warranto*, *mandamus*, *habeas corpus*, *procedendo*, or in which is involved the construction of the constitution of the United States, or the state of Ohio, or the jurisdiction of any court of this state, or the construction or validity of a treaty or statute of, or authority exercised under the United States, or in which the decision is contrary to that of any circuit court, and not in accord with a previous decision in the supreme court; but no petition in error in such cases, except as to the judgment or final order of the circuit court, or a

judge thereof, or of the general term of the superior court of Cincinnati, shall be filed without leave of the supreme court, or judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of evidence; and on application of any party excepting to a ruling or decision of the circuit court during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether error has intervened or not.

"Section 2. That section 6710 of the Revised Statutes of Ohio, as amended April 25, 1898, be and the same is hereby repealed.

"Section 3. This act shall take effect from and after its passage, and shall apply to all causes of action existing, and actions pending at that time in all courts inferior to the supreme court.

"Passed May 12, 1902."

It is insisted on behalf of the motion that the act, by its terms clearly excludes jurisdiction, and is too plain to admit of construction; while opposite counsel maintain that it was not within the legislative intent to deprive this court of any jurisdiction which it had theretofore possessed, but in reality to enlarge its scope by simply removing the exclusion from that jurisdiction of causes in which is involved an amount under three hundred dollars.

The court has been favored, and much aided in the examination of the case, by the arguments of counsel, not only on the part of those of record, but of the others who appeared as *amicus curiae*.

One of the grounds urged against the literal interpretation of the act, perhaps the principal one, is

that the jurisdiction sought now to be denied the court has been exercised by it ever since its organization, save as affected by the amendment of April 25, 1898, excluding causes wherein there was not involved over the sum of three hundred dollars, and from this history of the statute, and of the amendment referred to, it becomes at once manifest that it was not within the legislative intent to take from the jurisdiction of the court, but on the contrary to again confer upon it the full jurisdiction which it has at all times theretofore exercised; that this claim is aided by a consideration of the subject-matter and the general policy of the state with respect to that subject-matter. So that, though the precise letter be against this conclusion, yet if a slight reconstruction of a sentence, or a change in punctuation, or the adding of a conjunctive, will carry out what was the manifest intent of the act, then such changes are demanded in the public interest, and the statute should be so read, and that this can be done by reading into the statute the word "and" after the word "case," causing the first lines of the act to read: "A judgment rendered, or a final order made by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court, or a judge thereof, may be reversed or modified by the supreme court on petition in error, for errors appearing upon the record in any case, *and* in quo warranto, mandamus, habeas corpus," etc.

It is further urged that a slight change of punctuation will relieve the difficulty. By changing the comma after the word "record" where it first appears to a semi-colon, and by inserting a comma before the word "but" in the place of the semi-colon, it will then

be plain that the intent was to enlarge and not circumscribe the jurisdiction. A like result would follow, it is suggested, if a comma were inserted after the word "case" and before the words "in quo warranto," and then the enumeration of classes thereafter following treated as surplusage.

Finally it is contended that, upon general principles, the court may well take notice of the information communicated by counsel that neither the author of the bill nor the judiciary committee under whose inspection it presumably passed, nor the members of either house, had any purpose of curtailing the jurisdiction of this court, or indeed any suspicion until after their adjournment that that result had been brought about.

Undoubtedly the law is that the object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it, and that where the provisions of a given act are ambiguous, and its meaning doubtful, the history of legislation on the subject and the consequences of following a literal interpretation of the language may, and ought to be considered. Words may be transposed, or those necessary to a clear understanding and manifestly intended, as shown by the context, inserted. In the same way, and for a like purpose, punctuation may be changed or disregarded. This is allowable where doubt appears on the face of the act. But it is equally the law, we suppose, that the court does not possess, and should not attempt to exercise, the power of introducing doubt or ambiguity not apparent in the language, and then resort to verbal modifications to remove such doubt and conform the act to the court's supposition with respect to the intent of the legislature, for it seems well settled,

as expressed by Story, J., in *Gardner v. Collins*, 2 Pet., 58: "What the legislative intent was can be derived only from the words they have used; we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*." The principle is expressed in different form by Allen, J., in *McClusky v. Cromwell*, 11 N. Y., 593: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction the contracts of parties. The office of interpretation is to bring sense out of the words used and not bring a sense into them." Citing Lieber's *Polit. and Le. Hermeneutics*, 87; 2 *Ruth, Inst.*, Ch. 7, sec. 2; *Story's Com. on Const.*, sec. 392; *Purdy v. The People*, 4 Hill, 384; *Smith Statutes, etc.*, sec. 478; *Waller v. Harris*, 20 Wend., 561. And equally

clear upon this point are the words of Ruggles, J., at page 604, in dissenting from the judgment. Decisions and opinions of text writers of like import are so abundant that one is at a loss which to select. We content ourselves with citing the following: *Woodbury v. Berry*, 18 Ohio St., 456; *Alexander v. Worthington*, 5 Md., 471; *Newell v. The People*, 7 N. Y., 9; Bishop on Written Laws, sec. 72; Endlich on In. of Statutes, secs. 7, 8; Hardcastle on Com. of Statutes, sec. 2; Sedgwick on S. & C. Con., 194; Smith on Com. Con., 504.

Coming to the act itself it must be apparent to every intelligent reader that, with respect to the question we are considering, there is no ambiguity or doubt as to the natural meaning of the words used. Taking it just as it comes to us from the hand of the law-making body, the import of the act is clear and explicit. To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. Plainly then we are asked to import into the act a doubt as to its meaning and then resort to a change of phraseology, or punctuation, or to an addition of words, or to a rejection of classes of cases enumerated, in order to remove the doubt that we have thus created, a doubt based upon considerations and conjectures *aliunde*. This the court may not do. The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much what did the legislature intend to enact, as what did it mean by what it did enact. The words asked to be incorporated would be the words of the expounders and not of the law-makers. Respecting punctuation it may be said as in *Trustees v. White*, 48 Ohio St.,

581: "In construing a statute, punctuation may be changed or disregarded. It will not, ordinarily, control unless other means fail. At the same time it is more or less to be relied upon in ascertaining the meaning intended. The presence of a comma, in one place or another, would not be allowed to subvert the obvious meaning of a sentence. On the other hand, it would not without reason appearing for it, be disregarded. If that which appears to have been the general purpose of the legislature is as well effectuated by reading the statute exactly as it has been caused to be printed, as it would be by changing it, even as to punctuation, no adequate motive is present moving to the change."

Attention is called to a number of reported decisions of this court involving construction where words have been added, the position of others altered or punctuation changed or disregarded. A marked one is that of *Sawyer v. State*, 45 Ohio St., 343. It was in mandamus to compel the sheriff of Cuyahoga county to issue proclamation for an election of a circuit judge. The act construed was one to amend an act relating to the organization and jurisdiction of the circuit court and other courts. It purported to provide for the election of three judges of that court, one for the eighth and two for the sixth circuit, "on the first Tuesday of November next," which that year (1887) would be one week prior to the day of the general fall election. No machinery had been provided in the act for, nor the slightest allusion made to, the manner of conducting the election, or of making and certifying the returns and ascertaining the result. Resort to the provisions of the acts to which this was an amendment, therefore, became necessary in order to ascertain the method and obtain authority for the conduct

of the proposed election. An inspection of those acts showed that full provision had been made for the election machinery and that that provision contemplated the conduct of an election to be held, as specified in the acts, on the first Tuesday *after* the first Monday. The court was of the opinion that the later act could not be enforced without resort to the authority given by the statute to which it was an amendment, and that, construing the acts as a whole, the legislative intent was to have but one election, and that one to be held at the time fixed by the earlier acts. The court was further of opinion that if the later act was to be treated as special, and as intending to provide for a special election, it was "a vain and idle form by reason of its failure to provide any means of ascertaining and declaring the result, and must fall of its own inherent infirmity." To prevent this result and save the act, the court held that the real purpose was not to fix the day for holding an election, but to create a new judicial circuit and three new judgeships. The judgment of the circuit court ordering a writ of mandamus was, therefore, affirmed. It would be poor use of space to devote it to explaining the differences between this case and the one at bar. They are apparent at a glance. And it will be found upon an inspection of all the cases where the court has added to or changed the language or punctuation of the law as enacted that there was some doubt as to its meaning apparent on the face of the act.

It is urged that, under the rule that statutes are to be construed in connection with all laws *in pari materia*, resort should be had to section 440 of the Revised Statutes, which section provides for the advancement of certain cases and the hearing of the same out of their order on the docket, among others

those where damages are asked for personal injury or death by negligence, which class of cases is entirely excepted by the terms of the act under review, and, it is insisted, it would be fair to say that had the legislature intended to exclude damage cases some reference would have been made to section 440, so that the two statutes might have been made consistent. At first blush this claim seems reasonable. But its force fades away when it is reflected that section 440 is in no sense a statute giving jurisdiction, but is simply a provision for the order in which causes as to which the court has jurisdiction, may be heard and disposed of. It is to be further observed that section 440 may still have application to causes of which this court had taken jurisdiction before the passage of the act of May 12. And it may be added that a similar inconsistency, if it be such, alike in kind though less in degree, exists between section 440 and section 6710, as it stood prior to the late amendment. The later act affects damage cases generally, while the other affected such as did not involve more than three hundred dollars. Yet it has not been doubted that the three hundred dollar provision is effective, although in that amendment to section 6710 no reference is made to section 440. We are of opinion that a consideration of section 440 hardly aids the contention.

In conclusion we are impressed that if the court may properly assume to place upon this law a construction in conformity with the claim of the counsel who oppose the motion, by the incorporation of additional words, or by the changing of the punctuation so as to give a meaning to the act inconsistent with its terms, no good reason would remain why the court could not as to any piece of legislation, alter it so as to make it conform to the court's idea of what the act

should have been, and thus substitute for the will and judgment of the body whom the people have chosen to make the laws, the will and judgment of those whom the people have selected to expound them.

It is suggested that the record shows that the case is one involving the jurisdiction of the lower court, and for that reason this court has jurisdiction. It is true that one ground of demurrer to the petition was that the court has not jurisdiction of the subject-matter of the action. But an examination of the pleading shows that this could only mean that the court had no jurisdiction to control the official legislative acts of the village council. The point is not well taken.

For the reasons stated the motion will be sustained and the cause dismissed.

Dismissed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN
THIS VOLUME, WHICH ARE NOT
REPORTED IN FULL.

No. 7139.

LINGAFELTER *v.* TRUST COMPANY ET AL.

(Decided February 18, 1902.)

ERROR to the Circuit Court of Licking county.

Mr. J. M. Swartz and Messrs. Flory & Flory, for
plaintiff in error.

Messrs. Kibler & Kibler, for defendants in error.

Judgment affirmed upon the sole ground that the
plaintiff in error has failed to comply with section
6711 of the Revised Statutes, the pleadings not being
printed.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7784.

CITY OF CINCINNATI ET AL. *v.* WILLEN.

(Decided February 18, 1902.)

ERROR to the Superior Court of Cincinnati.

(633)

Memoranda of

Mr. Charles J. Hunt and Mr. Wade H. Ellis, corporation counsel, for plaintiffs in error.

Messrs. Horstman & Horstman and Mr. George H. Kattenhorn, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7171.

COLUMBUS & HOCKING VALLEY MINING CO. *v.* REINHARD & COMPANY.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Franklin county.

Messrs. Huggins, Sowers & Watson and Mr. William T. McClure, for plaintiff in error.

Mr. G. J. Marriott; Mr. George A. Fairbanks; Messrs. Pugh & Pugh; Mr. T. E. Steele and Messrs. Rankin & Rector, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7394.

SWEETER, PEMBROKE & COMPANY *v.* PLANTZ ET AL.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Meigs county.

Causes not reported in full.

Mr. J. W. Moore, for plaintiff in error.

Mr. M. S. Webster, for defendants in error.

Judgment modified as per journal entry.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK
and PRICE, JJ., concur.

No. 7749.

HOLCOMB *v.* MT. VERNON BRIDGE COMPANY.

(Decided February 25, 1902.)

ERROR to the Circuit Court of Knox county.

Mr. F. V. Owen, for plaintiff in error.

Mr. J. B. Waight and *Messrs. Cooper & Moore*, for
defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 6700.

PRICE, ADMX., *v.* RAILROAD COMPANY.

(Decided March 4, 1902.)

ERROR to the Superior Court of Cincinnati.

Mr. John Marshall Smedes, for plaintiff in error.

Messrs. Harmon, Colston, Goldsmith & Hoadly, for
defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Memoranda of

No. 6701.

HOFFRICHTER ET AL. *v.* SAVINGS & LOAN COMPANY
ET AL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Allen county.

Mr. P. R. Kerr and *Mr. M. J. Sanford*, for plaintiffs in error.

Mr. Horace A. Reeve, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 6735.

PALMER *v.* BRICKELL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Franklin county.

Mr. Tyndale Palmer and *Mr. R. W. McCoy*, for plaintiff in error.

Mr. J. T. Holmes and *Mr. J. E. Sater*, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6740.

HEIDINGSFELD *v.* BAUER ET AL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Hamilton county.

Causes not reported in full.

Mr. Ben L. Heidingsfeld and Mr. Henry P. Kauffman, for plaintiff in error.

Mr. Oscar M. Gottschall; Mr. Adolph L. Brown; Mr. Harry Hoffheimer; Mr. Victor Abraham and Messrs. Gottschall, Crawford & Limbert, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6761.

JONES *v.* VEITOR ET AL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Mahoning county.

Mr. George F. Arrel, for plaintiff in error.

Mr. M. C. McNab and Mr. R. B. Murray, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6907.

FRIEDMAN *v.* SOLOMON.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Clermont county.

Mr. H. B. Whiteman and Messrs. Hulick & Bishop, for plaintiff in error.

Messrs. Frazier & Hicks and Mr. F. K. Parrott, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

Memoranda of

No. 6943.

AEH v. BLOMYER, ADMR.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Scioto county.

Mr. N. W. Evans and Mr. Duncan Livingstone, for plaintiff in error.

Mr. T. C. Anderson and Mr. John R. Hughes, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7207.

RITCHIE v. ELY.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Williams county.

Messrs. Bowersox & Starr, for plaintiff in error.

Mr. John M. Killits, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7353.

JOHNSON ET AL. v. CARPENTER, RECEIVER, ET AL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Lucas county.

Causes not reported in full.

Messrs. Squire, Sanders & Dempsey and Messrs. Swayne, Hayes & Tyler, for plaintiffs in error.

Mr. Charles A. Thatcher and Messrs. Hurd, Brumback & Thatcher, for defendants in error

Judgment affirmed.

BURKET, SHAUCK and PRICE, JJ., concur.

No. 7398.

GRANT *v.* GRANT ET AL.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. W. O. Werntz, for plaintiff in error.

Mr. R. S. Ambler; Messrs. McCarty, Craine & McDowell; Mr. C. T. Meyer; Mr. W. H. Smith; Mr. John C. Welty; Mr. James J. Grant; Messrs. Harter & Krichbaum and Messrs. Lynch, Day & Day, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7773.

RAILROAD COMPANY *v.* CINCINNATI.

(Decided March 4, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. C. B. Matthews; Mr. John C. Healy and Mr. Powell Crosley, for plaintiff in error.

Mr. Charles J. Hunt, corporation counsel, and *Mr. H. R. Probasco*, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

Memoranda of

No. 6949.

CLINK ET AL. v. PETERS ET AL.

(Decided March 11, 1902.)

ERROR to the Circuit Court of Sandusky county.

Messrs. Meek, Dudrow & Worst and Messrs. Beard & Beard, for plaintiffs in error.

Mr. James O. Troup; Messrs. Finnefrock & Garver and Mr. Byron A. Fouche, for defendants in error

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7381.

SHRIVER ET AL. v. BEALL, ASSIGNEE.

(Decided March 11, 1902.)

ERROR to the Circuit Court of Crawford county.

Messrs. Beer & Monnette, for plaintiffs in error.

Messrs. Kinney & Newton and Mr. Dorsey L. Beall, for defendants in error.

Judgment of the circuit court vacated and cause remanded to consider the question presented by bill of exceptions.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7532.

BROWNE, ASSIGNEE, v. WALLACE, ASSIGNEE, ET AL.

(Decided March 11, 1902.)

ERROR to the Circuit Court of Hamilton county.

Causes not reported in full.

Mr. F. W. Browne, for plaintiff in error.

Mr. Charles B. Wilby and *Mr. Gustavus H. Wald*,
for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7677.

RAILWAY COMPANY *v.* MCCLAIN, ADMX.

(Decided March 11, 1902.)

ERROR to the Circuit Court of Coshocton county.

Messrs. Dunbar & Sweeney and *Mr. W. R. Pomerene*, for plaintiff in error.

Mr. E. W. James, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6883.

ROSENBAUM *v.* PENDLETON, TRUSTEE.

(Decided March 18, 1902.)

ERROR to the Superior Court of Cincinnati.

Mr. Charles B. Wilby and *Mr. Gustavus H. Wald*,
for plaintiff in error.

Mr. R. B. Bowler and *Mr. Harlan Cleveland*, for
defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Memoranda of

No. 6884.

HICKSVILLE v. HARKER.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Defiance county.

Messrs. Griffin & Simmons and Messrs. Harris, Cameron & Shaw, for plaintiff in error.

Mr. J. C. Ryan; Mr. B. F. Enos; Mr. W. D. Hill; Mr. H. G. Baker and Messrs. Sutphen & Sutphen, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET and DAVIS, JJ., concur.

No. 7004.**SNYDER ET AL. v. REAM ET AL.**

(Decided March 18, 1902.)

ERROR to the Circuit Court of Clark county.

Mr. George Arthur, for plaintiffs in error.

Mr. John L. Zimmerman and Mr. Webb W. Witmeyer, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7164.**ROWLEY v. BRIGGS.**

(Decided March 18, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Causes not reported in full.

Messrs. Dickey, Brewer & McGowan, for plaintiff in error.

Messrs. Wilcox & Friend and *Mr. W. C. Ong*, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7291.

BONHAM v. HAMILTON.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. Drausin Wulsin; *Messrs. Simrall & Galvin* and *Mr. Scott Bonham*, for plaintiff in error.

Mr. Province M. Pogue and *Messrs. Pogue & Pogue*, for defendant in error.

Judgment of the circuit court reversed and that of the common pleas affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7391.

HARPER v. MARCKEL.

(Decided March 18, 1902.)

ERROR to the Circuit Court of DeFiance county.

Messrs. Winn & Hay and *Mr. K. V. Haymaker*, for plaintiff in error.

Messrs. Harris, Cameron & Shaw, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

Memoranda of

No. 7397.

GRANT *v.* MCCARTY, ADMR., ET AL.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. W. O. Werntz, for plaintiff in error.

Mr. R. S. Ambler; *Messrs. McCarty, Craine & McDowell*; *Mr. James J. Grant* and *Messrs. Lynch, Day & Day*, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7402.

JOHN A. LOGAN COUNCIL NO. 6 *v.* BOMBERGER.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Stark county.

Messrs. Sterling & Braucher, for plaintiff in error.

Messrs. Bow & Bowman, for defendant in error.

Judgment reversed and judgment for plaintiff in error on the authority of *Myers et al. v. Jenkins*, 63 Ohio St., 101.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7418.

BIGLER *v.* FREIBERG ET AL.

(Decided March 18, 1902.)

ERROR to the Circuit Court of Warren county.

Causes not reported in full.

Mr. W. F. Eltzroth and Mr. W. C. Maple, for plaintiff in error.

Messrs. Runyan & Stanley and Messrs. Brandon & Burr, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 6913.

SHRADER, ADMR., *v.* BLINE, ADMX., ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Licking county.

Mr. Charles Follett and Mr. C. H. Follett, for plaintiff in error.

Mr. S. M. Hunter and Mr. J. N. Swartz, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6953.

CONFARR ET AL. *v.* CONFARR ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Greene county.

Messrs. Little & Spencer, for plaintiffs in error.

Mr. W. F. Trader, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Memoranda of

No. 6959.

**SHARP, EXECUTOR, ET AL. v. BROAD STREET PRESBY-
TERIAN CHURCH.**

(Decided March 25, 1902.)

ERROR to the Circuit Court of Franklin county.

Messrs. Page & Page, for plaintiffs in error.

*Messrs. Huggins; Sowers & Watson and Mr. T. J.
Duncan*, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 6967.

GALLAHER v. BERTCHEY, ADMX

(Decided March 25, 1902.)

ERROR to the Circuit Court of Belmont county.

Mr. J. A. Gallaher, for plaintiff in error.

Messrs. Tallman & Armstrong, for defendant in
error.

Judgment affirmed.

**BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.**

No. 6987.

SHARP ET AL., TRUSTEES, v. WILSON ET AL., TRUSTEES.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Shelby county.

Mr. D. Oldham; Mr. W. D. Davies and Messrs. Pugh & Pugh, for plaintiffs in error.

Mr. S. L. Wicoff and Mr. John F. Wilson, for defendants in error.

Judgment affirmed. Constitutional question not entertained.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7018.

KLOEB, AUDITOR, *v.* STATE EX REL. SNYDER.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Mercer county.

Messrs. Marsh & Loree, for plaintiff in error.

Mr. Charles S. Younger and Mr. P. Johnson, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7019.

KLOEB, AUDITOR, *v.* STATE EX REL. GILBERG & CHAPMAN.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Mercer county.

Messrs. Marsh & Loree, for plaintiff in error.

Mr. Charles S. Younger, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

Memoranda of

No. 7024.

DOPPE ET AL. *v.* RAILWAY COMPANY ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. C. W. Baker, for plaintiffs in error.*Messrs. Harmon, Colston, Goldsmith & Hoadly;*
Mr. Drausin Wulsin and *Ellis G. Kinkead*, corporation counsel, for defendants in error.

Judgment affirmed on grounds stated by circuit court.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7058.MEADOW RUN COAL & IRON CO. ET AL. *v.* WILLARD,
TRUSTEE, ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Jackson county.

Mr. J. P. Bradbury; Mr. John T. Moore and *Messrs. Powell & Eubanks*, for plaintiffs in error.*Mr. J. M. McGillivray* and *Mr. T. A. Jones*, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7059.MEADOW RUN COAL & IRON CO. *v.* JONES ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Jackson county.

Causes not reported in full.

Mr. John T. Moore and Messrs. Powell & Eubanks,
for plaintiff in error.

Mr. J. M. McGillivray and Mr. T. A. Jones, for de-
fendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7423.

PENNSYLVANIA COMPANY ET AL. *v.* MADDEN ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. J. R. Carey and Mr. F. J. Mullins, for plain-
tiffs in error.

Messrs. Day, Lynch & Day, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7244.

PENNSYLVANIA COMPANY ET AL. *v.* WELCH ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. J. R. Carey and Mr. F. J. Mullins, for plaintiffs
in error.

Messrs. Day, Lynch & Day, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Memoranda of

No. 7245.

PENNSYLVANIA COMPANY ET AL. *v.* WELCH ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Stark county.

Mr. J. R. Carey and Mr. F. J. Mullins, for plaintiffs
in error.*Messrs. Day, Lynch & Day*, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7237.JACOBS *v.* BANKING COMPANY.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Montgomery county.

Messrs. Dickson & Clark, for plaintiff in error.*Messrs. Patterson & Murphy*, for defendant in
error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7597.BUCKEYE STAVE COMPANY *v.* SMITH.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Wood county.

Causes not reported in full.

Messrs. Troup & Ramsey, for plaintiff in error.

Messrs. Baldwin & Harrington, for defendant in error.

Judgment reversed and remanded for new trial for cause stated in journal entry.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7619.

STREET RAILWAY COMPANY *v.* GARD ET AL.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Franklin county.

Messrs. Booth, Keating & Peters, for plaintiff in error.

Mr. O. A. Macy; Messrs. Keifer & Keifer; Messrs. Byrne, Rubrecht & Wildermuth and Mr. James M. Butler, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7681.

ELECTRIC RAILWAY COMPANY *v.* WADSWORTH.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Memoranda of

Messrs. Kline, Carr, Tolles & Goff and Mr. A. T. Ingersoll, for plaintiff in error.

Mr. J. W. Taylor and Mr. T. H. Garry, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and PRICE, JJ., concur.

BURKET and DAVIS, JJ., dissent.

No. 7784.

CINCINNATI ET AL. *v.* WILLEN.

(Decided March 25, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. Charles J. Hunt and Mr. Wade H. Ellis, corporation counsel, for plaintiffs in error.

Messrs. Horstman & Horstman and Mr. George H. Kattenhorn, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 6974.

LAKE SUPERIOR CONSOLIDATED IRON MINES *v.* ANDERSON.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Ashtabula county.

Causes not reported in full.

Messrs. Wilcox & Friend and Mr. Allen M. Cox, for plaintiff in error.

Messrs. Perry & Roberts, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7035.

TRIBUNE PUBLISHING COMPANY ET AL. v. BLOSSOM.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Montgomery county.

Mr. Thornton M. Hinkle and Messrs. Gottschall, Crawford & Limbert, for plaintiffs in error.

Messrs. McMahon & McMahon and Messrs. Nevin, Nevin & Kalbfus, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7053.

EALAND v. MYERS ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Richland county.

Messrs. Skiles & Skiles and Messrs. Brucker & Cummins, for plaintiff in error.

Messrs. Douglass & Mengert, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Memoranda of

No. 7062.

COMMISSIONERS ET AL. v. STATE EX REL. FANNING.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Mr. P. H. Kaiser, county solicitor; *Messrs. Hadden, Parks & Parks* and *Mr. Walter C. Ong*, for plaintiffs in error.

Messrs. White, Johnson, McCaslin & Cannon and *Messrs. Garfield Garfield & Howe*, for defendant in error.

Judgment affirmed on authority of *Findlay v. Pendleton*, 62 Ohio St., 80; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St., 219.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7068.

McCOY v. McCOY ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Wayne county.

Mr. Lee Elliott and *Mr. Frank Taggart*, for plaintiff in error.

Mr. A. D. Metz and *Mr. J. B. Meech*, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

Causes not reported in full.

No. 7076.

BARBOUR, ASSIGNEE, *v.* STOLL ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Erie county.

Mr. H. L. Peeke and Mr. C. T. Johnson, for plaintiff
in error.

Messrs. King & Guerin, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7094.

SOUTHERN GRANITE COMPANY *v.* NATIONAL BANK.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Hamilton county.

Messrs. O'Hara & Jordan, for plaintiff in error.

Mr. E. L. DeCamp and Mr. C. B. Matthews, for de-
fendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7148.

JONES *v.* JONES ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Butler county.

Memoranda of

Mr. E. W. Kittredge; Messrs. Morey, Andrews & Morey and Messrs. Shotts & Millikin, for plaintiff in error.

Mr. Israel Williams and Mr. Alex F. Hume, for defendants in error.

Judgment vacated and cause remanded to the circuit court with instructions to pass upon the questions presented by bill of exceptions.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7228.

DESCHLER *v.* FRANKLIN, EXR.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Ross county.

Mr. W. E. Evans, for plaintiff in error.

Messrs. Harrison, Olds & Henderson; Mr. William Allen Scott and Mr. John P. Phillips, for defendant in error.

Judgment vacated and cause remanded to the circuit court with instructions to pass upon the petition in error in circuit court, on authority of *Cramer v. Railway Co.*, 53 Ohio St., 436.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7247.

HECK ET AL. *v.* STATE OF OHIO.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Tuscarawas county.

Causes not reported in full.

Mr. A. W. Patrick and Messrs. Necly & Patrick, for plaintiffs in error.

Mr. H. H. Porter and Mr. John A. Buchanan, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7263.

RIENOEHL *v.* HUONKER, CITY CLERK, ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Clark county.

Mr. J. K. Mowser and Mr. D. F. Reinoehl, for plaintiff in error.

Mr. D. Z. Gardner, city solicitor, for defendants in error.

Judgment affirmed on the ground that the request should have been made of the solicitor in office, and not of his predecessor; and on the further ground that injunction is not the proper remedy. The remedy is *quo warranto*.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7693.

ARCHER ET AL., TRUSTEES, ET AL., *v.* FRANK ET AL.

(Decided April 1, 1902.)

ERROR to the Circuit Court of Hamilton county.

Memoranda of

Mr. C. C. Archer; Mr. L. C. Black; Mr. Prescott Smith and Messrs. Kramer & Kramer, for plaintiffs in error.

Messrs. Stricker & Johnson and Mr. Henry P. Kaufman, for defendants in error.

Judgment reversed for cause stated in journal entry.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur

No. 7893.

CINCINNATI *v.* FERGUSON ET AL.

(Decided April 1, 1902.)

ERROR to the Superior Court of Cincinnati.

Mr. Charles J. Hunt, corporation counsel, for plaintiff in error.

Mr. W. T. Porter; Mr. Fred Hinkle; Mr. E. W. Kittedge; Mr. Edward Colston; Mr. George E. Martin and Mr. W. M. Ampt, for defendants in error.

Judgment affirmed on grounds stated in journal entry.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7026.

GIBSONBURG BANKING CO. *v.* WAKEMAN BANK CO.

(Decided April 4, 1902.)

ERROR to the Circuit Court of Sandusky county.

Causes not reported in full.

Messrs. Hunt & DeRan and Mr. Lester Wilson, for plaintiff in error.

Messrs. Andres Brothers, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7054.

GIESIN *v.* BERNER ET AL.

(Decided April 4, 1902.)

ERROR to the Circuit Court of Sandusky county.

Messrs. Love & Culbert, for plaintiff in error.

Mr. Byron A. Fouche; Messrs. Kinney, O'Farrell & Rimmerspach and Messrs. Finefrock & Garver, for defendants in error.

Judgment reversed. Grounds stated in journal entry.

WILLIAMS, C. J., BURKET, DAVIS and PRICE, JJ., concur.

No. 7169.

INSURANCE COMPANY *v.* MEIER.

(Decided April 4, 1902.)

ERROR to the Circuit Court of Summit county.

Memoranda of

Messrs. Allen & Cobbs and Mr. H. F. Burket, for plaintiff in error.

Mr. Andrew J. Wilhelm and Mr. Edwin F. Voris, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and PRICE, JJ., concur.

No. 7236.

SCHLOSSER v. STATE EX REL. MCARTHUR BROS.

(Decided April 4, 1902.)

ERROR to the Circuit Court of Mercer county.

Messrs. Loughridge & Taylor and Messrs. LeBlond & Landfair, for plaintiff in error.

Mr. J. D. Johnson, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7668.

TURNPIKE COMPANY v. MT. HEALTHY.

(Decided April 4, 1902.)

ERROR to the Circuit Court of Hamilton county.

Messrs. Follett, Kelley & Follett, for plaintiff in error.

Mr. Owen N. Kinney and Mr. H. K. Rogers, for defendant in error.

Judgment reversed. (Grounds stated in journal entry.)

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

Causes not reported in full.

No. 7395.

STATE EX REL. FERRELL *v.* FERNEDING ET AL.

(Decided April 15, 1902.)

ERROR to the Circuit Court of Montgomery county.

Messrs. VanPelt, Dale & Ferneding, for plaintiff in error.*Mr. S. A. Dickson*, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
CONCUR.

No. 7411.CLOUD *v.* HULL ET AL.

(Decided April 15, 1902.)

ERROR to the Circuit Court of Hancock county.

Mr. W. H. McElwaine, for plaintiff in error.*Messrs. Blackford & Blackford*, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not sitting.

No. 7448.CURRIE *v.* JASTER, SR.

(Decided April 15, 1902.)

ERROR to the Circuit Court of Trumbull county.

Memoranda of

Messrs. Gilbert & Chryst, for plaintiff in error.

Mr. T. H. Gillmer, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 6861.

ISAAC v. RAILWAY COMPANY.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Hamilton county.

Messrs. Littleford, Morris, & Ballard; Messrs. Ernst & Cassatt; Mr. William Littleford and Mr. Alfred C. Cassatt, for plaintiff in error.

Mr. J. W. Warrington; Mr. E. W. Kittredge; Messrs. Paxton & Warrington and Messrs. Kittredge & Wilby, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

No. 6961.

BANK v. PUMP COMPANY.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Butler county.

Messrs. Harris & Cameron and Messrs. Morey, Andrews & Morey, for plaintiff in error.

Mr. B. Harwitz; Mr. Alex. Hume and Mr. C. W. Baker, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and PRICE,
JJ., concur.

Causes not reported in full.

No. 7074.

LIMA v. RAILROAD COMPANY ET AL.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Allen county.

Mr. D. C. Henderson, for plaintiff in error.*Mr. A. McL. Marshall; Mr. I. R. Longworth and R. D. Marshall*, for defendants in error.

Judgment affirmed and cause remanded for new trial, it appearing that one of the grounds of reversal of the common pleas is that the verdict is against the weight of the evidence. Other questions not passed upon.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not sitting.

No. 7137.

BLUE ET AL., TRUSTEES, v. ENTREKIN, ADMR., ET AL.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Ross county.

Mr. H. W. Woodrow, for plaintiffs in error.*Mr. John C. Entrekin and Mr. John P. Phillips*, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

Memoranda of

No. 7183.

FRANK *v.* ARCHER ET AL.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. Sidney G. Stricker and Mr. H. P. Kaufman, for plaintiff in error.

Mr. L. C. Black; Mr. C. C. Archer; Mr. Prescott Smith; Mr. F. G. Roelker and Messrs. Kramer & Kramer, for defendants in error.

Judgment reversed and judgment as per journal entry.

WILLIAMS, C. J., BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7385.STATE *v.* O'BRIEN.

(Decided April 22, 1902.)

EXCEPTIONS to the Court of Common Pleas of Darke county.

Mr. Arthur L. Clark, prosecuting attorney, for plaintiff.

Mr. E. C. Wright, for defendant.

Exceptions sustained.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

Causes not reported in full.

No. 7445.

INSURANCE COMPANY *v.* ANDERSON ET AL.

(Decided April 22, 1902.)

ERROR to the Circuit Court of Lucas county.

Mr. Edmund R. Guiney, for plaintiff in error.

Mr. Karl A. Flickinger, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 6875.

NATIONAL SURETY COMPANY *v.* STAGER, SHERIFF,
ET AL.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Lucas county.

Mr. E. W. Tolerton, for plaintiff in error.

Messrs. Chittenden & Chittenden, for defendants in
error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 6963.

(Decided April 29, 1902.)

SPAULDING ET AL. *v.* ALLEN ET AL.

ERROR to the Circuit Court of Cuyahoga county.

Memoranda of

Messrs. Burke & Ingersolls, for plaintiffs in error.

Messrs. Burton & Drake and Mr. George L. Phillips,
for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS and
SHAUCK, JJ., concur.

No. 7211.

NELSON *v.* HEBRON.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Licking county.

Messrs. Kibler & Kibler, for plaintiff in error.

Mr. S. M. Hunter, for defendant in error.

Judgment affirmed on the ground that plaintiff
proved no negligence on part of defendant.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7216.

CORRIGAN ET AL. *v.* MACHINE COMPANY.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Summit county.

Mr. Orestes C. Pinney, for plaintiffs in error.

Mr. Edwin F. Voris, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Causes not reported in full.

No. 7229.

WEHRLE v. GRAEFE, TRUSTEE.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Ottawa county.

Mr. W. H. A. Read, for plaintiff in error.

Mr. Theodore Alvord and *Mr. Arthur Phinney*, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur

No. 7255.

NICHOLS v. GARDNER ET AL.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Sandusky county.

Messrs. Richards & Heffner, for plaintiff in error.

Mr. Jesse Vickery, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7261.

BANK v. LAKESIDE CO. ET AL.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

memoranda of

Mr. H. L. Peeke and Mr. George E. Reiter, for plaintiff in error.

Messrs. Carpenter & Young, for defendants in error.

Judgment affirmed.

WILLIAMS. C. J., SPEAR and SHAUCK, JJ., concur.

No. 7265.

WEAVER, ADMR., ET AL. *v.* HUNTINGTON ET AL.. EXRS.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Clark county.

Mr. George Arthur, for plaintiffs in error.

Messrs. Hagan & Kunkle, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7275.

NELSON *v.* BEREA.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Mr. Edmund Hitchins, for plaintiff in error.

Mr. W. B. Wheeler, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Causes not reported in full

No. 7289.

DAVIDSON ET AL. v. KIMMELL ET AL.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Harrison county,

*Mr. A. O. Barnes and Mr. John O. Dickerson, for plaintiffs in error.**Messrs. Pearce & Lemmon and Mr. D. A. Hollingsworth, for defendants in error.*

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7623.

KNOECHEL v. RAILWAY COMPANY

(Decided April 29, 1902.)

ERROR to the Circuit Court of Hamilton county.

*Messrs. Horstman & Horstman, for plaintiff in error.**Messrs. Paxton & Warrington, for defendant in error.*

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7799.

CINCINNATI ET AL. v. ALTER.

(Decided April 29, 1902.)

ERROR to the Superior Court of Cincinnati.

Memoranda of

Mr. Charles J. Hunt and Mr. Wade H. Ellis, corporation counsel, for plaintiffs in error.

Messrs. Horstman & Horstman and Mr. George H. Kattenhorn, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7876.

STREET RAILWAY COMPANY v. SNELL.

(Decided April 29, 1902.)

ERROR to the Circuit Court of Clermont county.

Mr. E. W. Kittredge and Mr. J. W. Warrington, for plaintiff in error.

Mr. John W. Wolfe and Mr. Thomas L. Michie, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., BURKET, SPEAR, DAVIS, SHAUCK
and PRICE, JJ., concur.

No. 7025.

TELEPHONE COMPANY v. PIPER.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Erie county.

Messrs. Touvelle, Masters & Adams and Mr. George E. Reiter, for plaintiff in error.

Messrs. Kelley & Merrill, for defendant in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and PRICE, JJ., concur.

Causes not reported in full.

No. 7131.

PFARR v. COMMISSIONERS ET AL.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Union county.

Mr. J. M. Kennedy and *Mr. N. F. Overturf*, for plaintiff in error.*Mr. W. T. Hoopes* and *Mr. James E. Robinson*, for defendants in error.

Judgment affirmed.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7156.

RAILROAD COMPANY ET AL. v. SMITH ET AL.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Licking county.

Mr. J. H. Collins and *Messrs. Kibler & Kibler*, for plaintiffs in error.*Mr. Carl Norpell*; *Mr. John David Jones* and *Mr. J. Buckingham*, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7192.

ROBRAHN v. HAMILTON ET AL.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Erie county.

Memoranda of

Mr. H. L. Peeke and Mr. George E. Reiter, for plaintiff in error.

Messrs. Kelley & Merrill, for defendants in error.

Judgment affirmed on authority of *Mitchell v. Ryan*, 3 Ohio St., 377.

WILLIAMS, C. J., SPEAR and SHAUCK, JJ., concur.

No. 7196.

RAILROAD COMPANY *v.* GLENN.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Licking county.

Mr. J. H. Collins and Messrs. Kibler & Kibler, for plaintiff in error.

Mr. B. G. Smythe and Mr. S. M. Hunter, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7406.

CONNER, ADMR., ET AL. *v.* BANK & TRUST CO., ADMR.,
ET AL.

(Decided May 6, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. John S. Conner and Mr. A. J. Freiberg, for plaintiffs in error.

Causes not reported in full.

Messrs. Paxton & Warrington; Messrs. Swing, Cushing & Morse and Mr. F. Sanford Brown, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7166.

SURETY COMPANY ET AL. v. STARR.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Montgomery county.

Messrs. Dale & Ferneding; Mr. C. S. Bowman and Messrs. Kohn & Northup, for plaintiffs in error.

Messrs. Dickson & Clark, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7184.

RAILWAY COMPANY v. BURD, ADMR.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Medina county.

Mr. E. G. Johnson; Mr. J. M. Lessick and Mr. Frank Heath, for plaintiff in error.

Messrs. Webber & Turner and Mr. Frank Spellman, for defendant in error.

Judgment reversed as per journal entry.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

Memoranda of

No. 7266.

SPEARS *v.* EBNER ET AL.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Clark county.

Mr. D. F. Reinoehl and Messrs. Keifer & Keifer, for plaintiff in error.

Mr. Walter L. Weaver; Messrs. Stafford & Arthur and Mr. John L. Plummer, for defendants in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7267.

SPRINKLER COMPANY *v.* MILLING COMPANY.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Clinton county.

Messrs. Ernst & Cassatt and Mr J. M. Kirk, for plaintiff in error.

Mr. C. W. Swain and Mr. Mills Gardner, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7419.

HARD, TREAS., *v.* INSURANCE COMPANY.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Medina county.

Causes not reported in full.

Mr. J. B. Jones and Mr. Frank Spellman, for plaintiff in error.

Mr. W. W. Boynton and Mr. Lee Elliott, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7452.

GILPIN *v.* CHALFANT ET AL.

(Decided May 13, 1902.)

ERROR to the Circuit Court of Guernsey county.

Mr. J. W. Campbell; Mr. W. S. Dougherty and Mr. Fred L. Rosemond, for plaintiff in error.

Messrs. Locke & Turnbaugh and Mr. R. T. Scott, for defendants in error.

Judgment reversed as per journal entry.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

No. 7204.

LIFE ASSOCIATION *v.* TROY.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Hamilton county.

Messrs. Giaque & McClure and Messrs. Cleveland & Bowler, for plaintiff in error.

Memoranda of

Messrs Shay & Cogan and Mr. Robert C. Pugh, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7208.

WHITMAN & BARNES MFG. CO. v. YERRICK.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Summit county.

Mr. Charles C Benner; Mr. Charles Baird and Mr. Edwin F. Voris, for plaintiff in error.

Mr. Samuel C. Rogers and Mr. Newell D. Tibbals, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7280.

WINNEMANN, ADMR., v. BREWING COMPANY.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Preusser & Winnemann, for plaintiff in error.

Messrs. Hoyt, Dustin & Kelley and Messrs. Henderson & Quail, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

Causes not reported in full.

No. 7308.

METHODIST PROTESTANT CHURCH ET AL. v. LAWS ET AL.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. C. B. Matthews; Mr. Charles T. Greve; Mr. Ben. B. Dale; Mr. Graham P. Hunt and Mr. Gustavus H. Wald, for plaintiffs in error.

Messrs. Maxwell & Ramsey, for defendants in error.

Judgment reversed and defendant in error enjoined from maintaining an obstruction across said right of way other than a gate made of pickets.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7311.

WINGERT, ADMR., v. EBERHART.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Crawford county.

Messrs. Beer, Bennett & Monnette and Messrs. Harris & Sears, for plaintiff in error.

Messrs. Finley & Gallinger, for defendant in error.

Judgment reversed on authority of *Bricker v. Elliott*, 55 Ohio St., 577.

BURKET, SPEAR, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not sitting.

Memoranda of

No. 7327.

INSURANCE COMPANY *v.* PURCELL.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Clermont county.

Mr. J. Hartwell Cabell, for plaintiff in error.*Messrs. Davis & Woodlief; Mr. Frank A. Roberts*
and *Messrs. Swing & Morse*, for defendant in error.

Judgment affirmed.

BURKET, SHAUCK and PRICE, JJ., concur.

No. 7364.TOLEDO *v.* CONVERSE ET AL.

(Decided May 20, 1902.)

ERROR to the Circuit Court of Lucas county.

Mr. Moses R. Brailey; Mr. Charles K. Friedman
and *Charles S. Northrup*, for plaintiff in error.*Mr. Ralph S. Holbrook* and *Messrs. Hamilton & Kirby*, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7113.YOUNG *v.* NEFF ET AL.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Franklin county.

Causes not reported in full.

Mr. George B. Okey; Mr. James A. Allen and Mr. C. D. Saviers, for plaintiff in error.

Messrs. Kinkead, Merwine & Schumacher and Mr. J. S. Friesner, for defendants in error.

Judgment affirmed.

SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

BURKET, J., not sitting.

No. 7190.

CAMBRIDGE v. CARLISLE.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Guernsey county.

Mr. W. C. Collins, for plaintiff in error.

Messrs. Rosemond & Pace, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7193.

RANKER, ADMX., v. ST. JOHN.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Seneca county.

Mr. A. Skransewsky and Mr. E. E. Williams, for plaintiff in error.

Messrs. McCauley & Weller, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not participating.

Memoranda of

No. 7201.

COBB v. SCOFIELD ET AL.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Goulder, Holding & Masten, for plaintiff in error.*Messrs. Henderson & Quail*, for defendants in error.Judgment reversed on authority of *Younglove v Lime Co.*, 49 Ohio St., 633, and *Bronson v. Schneider*, 49 Ohio St., 438.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7380.

STEINER v. AMSTUTZ ET AL.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Wayne county.

Messrs. Allen & Cobbs and *Mr. John McSweeney*, for plaintiff in error.*Mr. James B. Taylor*, for defendants in error.

Judgment affirmed. Cause remanded to the circuit court to make allowance of fees to attorneys.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7403.

GROSS ET AL. v. COMMISSIONERS ET AL.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Shelby county.

Causes not reported in full.

Messrs. West & West, for plaintiffs in error.

Mr. J. D. Barnes and Messrs. Goeke & Hoskins, for defendants in error.

Judgment vacated and cause remanded to the circuit court with instructions to proceed and hear the petition in error on its merits.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7410.

LEBENSBURGER v. PRICE.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Erie county.

Mr. George E. Reiter and Mr. H. L. Peeke, for plaintiff in error.

Messrs. C. P. & L. W. Wickham, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7414.

WEST ET AL. v. HOUSTON.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Fayette county.

Memoranda of

Messrs. Vandeman & Chaffin and Messrs. Gregg, Patton & Gregg, for plaintiffs in error.

Mr. Humphrey Jones, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS and PRICE, JJ., concur.

No. 7416.

RAILWAY COMPANY *v.* BOUCSEIN.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Mahoning county.

Messrs. Arrel, McVey & Robinson, for plaintiff in error.

Mr. W. S. Anderson and Mr. A. J. Woolf, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7429.

ROBINSON ET AL. *v.* BANK.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Fayette county.

Messrs. Harper & Harper, for plaintiffs in error.

Mr. Humphrey Jones, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

Causes not reported in full.

No. 7432. -

EELLS v. SHEA.

(Decided June 3, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Hoyt, Dustin & Kelley, for plaintiff in error.*Mr. E. Sowers*, for defendant in error.

Judgment affirmed.

BURKET, SPEAR and PRICE, JJ., concur.

No. 7209.

LARWILL v. BURKE ET AL.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Hancock county.

Mr. J. D. Critchfield; Messrs. Kibler & Kibler and Messrs. Henderson & Quail, for plaintiff in error.*Mr. Stevenson Burke; Mr. H. H. Poppleton; Messrs. Phillips & Phillips; Messrs. Follett & Follett; Mr. F. M. Black; Mr. J. B. Jones; Mr. A. A. Stearns and Mr. John W. Arnold*, for defendants in error.

Judgment affirmed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7277.

BRENNER v. ABBOTT ET AL.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Hancock county.

Memoranda of

Mr. A. G. Fuller and Mr. Jason Blackford, for plaintiff in error.

Messrs. J. A. & E. V. Bope; Mr. T. H. McConica; Mr. Franklin Franks and Messrs. Seney & Johnson, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not participating.

No. 7299.

PETERS v. PETERS.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Marion county.

Messrs. Mouser & Quigley and Messrs. Finley & Gallinger, for plaintiff in error.

Messrs. Scofield, Durfee & Scofield, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and SHAUCK, JJ., concur.

PRICE, J., not sitting.

No. 7315.

FERGUSON & CO. v. STRANG, JR., ET AL.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Defiance county.

Causes not reported in full.

Messrs. Harris, Cameron & Shaw; Mr. W. H. Najdowski and W. R. Crawford, for plaintiff in error.

Mr. W. D. Hill; Mr. H. G. Baker and Mr. Walter B. Ritchie, for defendant in error.

Judgment affirmed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7393.

COWEN ET AL., RECEIVERS, v. KRAMER ET AL.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Franklin county.

Mr. J. H. Collins, for plaintiffs in error.

Mr. Frank P. Jackson, for defendants in error.

Judgment vacated and remanded to the circuit court for hearing on the merits of petition in error.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7417.

LOY, ADMX., v. RAILWAY COMPANY.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Shelby county.

Messrs. Wicoff & Emmons and Mr. Wymond J. Beckett, for plaintiff in error.

Mr. S. O. Bayless; Mr. John F. Wilson and Mr. John T. Dye, for defendant in error.

Judgment affirmed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

Memoranda of

No. 7421.

SUTTON ET AL., COMMISSIONERS, v. STATE EX REL. RAILWAY COMPANY.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Clermont county.

Mr. C. B. Nichols and *Messrs. Davis & Woodlief*,
for plaintiffs in error.

Messrs. Maxwell & Ramsey, for defendant in error.

Judgment affirmed.

BURKET, DAVIS, SHAUCK and PRICE, JJ., concur.

No. 7641.

ANDREWS BROTHERS COMPANY v. BURNS.

(Decided June 10, 1902.)

ERROR to the Circuit Court of Mahoning county.

Mr. Thomas W. Sanderson and *Messrs. Johnston & Calvin*, for plaintiff in error.

Mr. A. J. Woolf and *Mr. W. S. Anderson*, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7058.

COAL & IRON COMPANY v. WILLARD, TRUSTEE ET AL.

(Decided June 17, 1902.)

ERROR to the Circuit Court of Jackson county.

Causes not reported in full.

Mr. J. P. Bradbury; Mr. John T. Moore and Messrs. Powell & Eubanks, for plaintiff in error.

Mr. J. M. McGillivray and Mr. T. A. Jones, for defendants in error.

Former judgment adhered to.

WILLIAMS, C. J., BURKET, SHAUCK and PRICE, JJ.,
concur.

No. 7117.

HOSEA, TRUSTEE, ET AL. v. CINCINNATI.

(Decided June 17, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. Charles B. Wilby; Mr. William G. Hosea and Mr. Gustavus H. Wald, for plaintiffs in error.

Mr. Charles J. Hunt; Mr. Wade H. Ellis and Mr. Albert H. Morrill, corporation counsel, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7167.

WINOUS POINT SHOOTING CLUB v. CASPERSEN ET AL.

(Decided June 17, 1902.)

ERROR to the Circuit Court of Ottawa county.

Memoranda of

Messrs. Goulder, Holding & Masten; Messrs. Love & Wierman and Messrs. Bartlett & Wilson, for plaintiff in error.

Mr. George A. True, for defendants in error.

Judgment affirmed on authority of *Bodi v. Winous Point Shooting Club*, 57 Ohio St., 226.

BURKET, SPEAR, SHAUCK and PRICE, JJ., concur.

No. 7321.

MUHKHAUSER ET AL. v. CLEVELAND HOSPITAL FOR WOMEN AND CHILDREN.

(Decided June 17, 1902.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Hessenmueller & Bemis, for plaintiffs in error.

Mr. Edward Bushnell, for defendant in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7213.

GARLICK v. RAILWAY COMPANY ET AL.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Mahoning county.

Messrs. Arrel, McVey & Robinson and Messrs. Hine & Kennedy, for plaintiff in error.

Causes not reported in full.

Messrs. Jones & Anderson and Mr. J. R. Carey, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

WILLIAMS, C. J., and SHAUCK, J., absent.

No. 7214.

GARLICK v. RAILWAY COMPANY ET AL.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Mahoning county.

Messrs. Arrel, McVey & Robinson and Messrs. Hine & Kennedy, for plaintiff in error.

Messrs. Jones & Anderson and Mr. J. R. Carey, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

WILLIAMS, C. J., and SHAUCK, J., absent.

No. 7215.

GARLICK v. RAILWAY COMPANY ET AL.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Mahoning county.

Messrs. Arrel, McVey & Robinson and Messrs. Hine & Kennedy, for plaintiff in error.

Memoranda of

Messrs. Jones & Anderson and Mr. J. R. Carey, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

WILLIAMS, C. J., and SHAUCK, J., absent.

No. 7338.

DEPOSIT BANK CO. v. MARTZ ET AL.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Darke county.

Mr. A. I. Voris and Messrs. Allread & Teegarden, for plaintiff in error.

Mr. J. T. Martz and Messrs. Trainer & Hoffman, for defendants in error.

Judgment affirmed.

BURKET, DAVIS and PRICE, JJ., concur.

No. 7489.

ROBERTS, AUDITOR, v. MIDDLEPORT.

(Decided June 24, 1902.)

ERROR to the Circuit Court of Meigs county.

Mr. H. C. Fish, prosecuting attorney, and Mr. J. P. Bradbury, for plaintiff in error.

Messrs. Russell & Russell, for defendant in error.

Judgment affirmed.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur.

Causes not reported in full.

No. 8046.

KERCH ET AL. v. WEAVER ET AL.

(Decided June 26, 1902.)

ERROR to the Circuit Court of Tuscarawas county.

Messrs. Wilkin & Wilkin and Mr. J. D. F. Bold,
for plaintiffs in error.*Messrs. Welty & Albaugh; Mr. Jasper H. Mitchell*
and *Mr. Amos V. Ruff*, for defendants in error.Dismissed for want of jurisdiction on authority of
Slingluff et al. v. Weaver et al., 66 Ohio St., 621.BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

No. 7737.

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(Decided June 27, 1902.)

ERROR to the Circuit Court of Crawford county.

Mr. Henry W. Seney and Messrs. Beer & Monnette,
for plaintiff in error.*Messrs. Finley & Gallinger and Mr. Horace Hol-*
brook, for defendants in error.*Messrs. Schaffer & Peck*, for defendant Hanna.Judgment reversed and cause remanded to the cir-
cuit court as per entry.BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
concur.

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(Decided June 27, 1902.)

ERROR to the Circuit Court of Hamilton county.

Mr. Ellis G. Kinkead and *Mr. Theodore Horstman*,
for plaintiff in error.*Mr. Charles J. Hunt* and *Mr. Wade H. Ellis*, for
defendant in error.

Judgment affirmed, the act entitled "An act to amend Secs. 2835, 2836 and 2837, and to repeal Sec. 2837*a*, of the Revised Statutes authorizing the issue of bonds by cities, villages, hamlets and townships," being constitutional.

BURKET, SPEAR, DAVIS, SHAUCK and PRICE, JJ.,
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Proceedings in contempt against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability. *Ib.*

AMENDMENTS—

Transcript of entries of probate court filed in common pleas to perfect appeal—May be amended under Sec. 5114, Rev. Stat.—Omitted entries may be supplied, when—See *Falconer v. Martin*, 352.

APPEAL—

1. *Transcript, when to be filed*—Section 6409, Rev. Stat.—*Transcript of entries of probate court filed in common pleas to perfect appeal—May be amended under Section 5114, Rev. Stat.—Omitted entries may be supplied, when*—A transcript of the entries of the probate court, which is required by Sec. 6409, Rev. Stat., to be filed in the office of the clerk of the court of common pleas to perfect an appeal from the former court to the latter, if filed within the time prescribed by that section, may, under favor of Sec. 5114, Rev. Stat., be amended by supplying omitted entries at any time before final judgment in the court of common pleas. *Johnson v. Johnson*, 31 Ohio St., 131, approved and followed. *Second National Bank of Bucyrus v. Moderwell*, 59 Ohio St., 221, modified by limiting the syllabus to the point decided. *Falconer v. Martin*, 352.

2. *Notice of intention to appeal—By one in fiduciary capacity—Requirements of statute*—Section 6408, Rev. Stat.—To perfect an appeal under Revised Statutes, Sec. 6408, by a party in a fiduciary capacity who appeals in the interest of the trust, a separate written notice to the court of an intention to appeal is necessary. A recital in a journal entry of an intention to appeal, or that the party gives, or has given, notice of an intention to appeal, is not a compliance with the statute. *Brown v. Wallace*, 57.

APPOINTMENT—

1. *Duty and power of appointment conferred by legislature—Art. 2, Sec. 27, Const.—Function is ministerial not executive*—The duty and power of making appointment to fill a vacancy in the office of lieutenant governor is not specially conferred on the executive branch of the government by the con-

Appointment—Assessments.

stitution, and rests wherever the legislature may vest it. (Article 2, Section 27.) Such duty being imposed on the governor by statute, it is not an executive function but is a ministerial duty. *State ex rel. v. Nash, Governor*, 612.

2. *Vacancy must be filled by appointment under Sec. 81, Rev. Stat.*—There is no provision in the constitution for filling a vacancy in the office of lieutenant governor, except as authorized under section 27, article 2; and when such vacancy occurs it must in all cases be filled by appointment by the governor as provided in Revised Statutes, section 81. *Ib.*
3. *Term of office of such appointee*—The term of office of such appointee shall be for the unexpired portion of the term and until his successor is elected and qualified as provided in Revised Statutes, section 11; and "the first proper election" is the first election at which a lieutenant governor would have been chosen had no such vacancy occurred. *Ib.*

Persons succeeding defendants in office—Without authority to possess property of the office unless act of appointment is valid. See *State ex rel. v. Jones*, 453.

Sureties on bond of executor estopped to deny appointment, when. See *Hoffman v. Fleming*, 143.

APPORTIONMENT—

Of valuation of railway property—Sec. 2774, Rev. Stat.—Among counties. See *State ex rel. v. Aldridge*, 598.

APPROPRIATION—

Abutting owners entitled to injunction against construction of interurban railroad, and electric plant, in highway until compensation is assessed and paid. See *Schaaf v. Railway Co.*, 215.

*Property interest of abutting owner in street—Compensation—*Placing of poles, lines and wires by private lighting company—A taking of property within Sec. 19, bill of rights—Injunction. See *Callen v. Electric Light Co.*, 166.

Compensation for land appropriated for public use—Limitations upon. See *City of Dayton v. Bauman*, 379.

ASSESSMENTS—

1. *Power of assessment by cities*—Sec. 6, Art. 13, Const.—*Limitation by Sec. 19, Art. 1*—The limitation of section 19 of article 1 of the constitution on section 6 of article 13 as to assessments, goes to the full extent of prohibiting the raising of money directly or indirectly by assessment to pay compensation, damages or costs for lands appropriated by the public

 Assessments—Attachment and Garnishment.

ASSESSMENTS—Continued.

for public use. *Railway Co. v. Cincinnati*, 62 Ohio St., 465, approved and followed. *Dayton v. Bauman*, 379.

2. *Limitation does not prohibit assessments within benefits*—Said limitation does not affect or prohibit the raising of money by assessment to pay for surface improvement of streets, sewers, etc., so long as the assessment does not exceed the special benefits conferred. *Walsh v. Barron*, 61 Ohio St., 15, approved and followed. *Ib.*

ASSETS—

Credit due two corporations united for joint business not partnership assets. See *Geurinck v. Alcott*, 94.

ASSIGNMENT—

Certificate of stock issued to secretary of company—By him assigned and delivered to *bona fide* holder—Not transferred on books—Fraudulently reobtained and delivered to third party—First assignee real owner. See *Farmers Bank v. Safe & Lock Co.*, 367.

Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not real party in interest, when—Secs. 4993 and 4995, Rev. Stat. See *Brown v. Ginn*, 316.

Accounts owned by different holders against same debtor—Contract assigned to one termed trustee for collection upon contingent fee, champertous, when. *Ib.*

ASSIGNMENTS FOR CREDITORS—

Assignment of pledgor, within ninety days after transfer of security—Not fraudulent—Application of Sec. 6343, Rev. Stat. See *Hunt v. Bode*, 255.

ATTACHMENT AND GARNISHMENT—

Attachment does not apply to non-resident of state, when—Section 5521, Rev. Stat., as amended—*Invalidity of act under law not in force*—The act amending section 5521 of the Revised Statutes, which was passed by the general assembly on the 26th of April, 1898 (repealed in 1900), did not make non-residence of this state a ground of attachment, and therefore, an order of attachment issued on that ground, while said amended section was in force, is invalid. See *Hough v. Dayton Manufacturing Co.*, 427.

Section 3 of the act of April 26, 1898 (93 O. L., 318), amending Sec. 5521, Rev. Stat., relating to grounds of attachment, and which amendment omitted non-residence, in enumerating

Attachment and Garnishment—Bonds.

such grounds, providing that "this act shall not extend to or affect any existing debt, contract, note or judgment, relates to a then existing cause of action, and not to a cause or ground of attachment. *Hough v. Manufacturing Co.*, 438.

Rule as to enforcement of judgment by attachment in contempt where decree is remanded by circuit to common pleas court jurisdiction. See *State, etc. v. Cook*, 566.

Illegality of combination to regulate prices—Proceeds not tainted with illegality—When subject to garnishment. See *Geurinck v. Alcott*, 94.

Money in hands of third person for two corporations united for joint business—Half belongs to each—Garnishment. *Id.*

ATTORNEYS—

Contingent fee to collector, champertous, when, See *Brown v. Ginn*, 316.

BILL OF RIGHTS—

See CONSTITUTIONAL LAW (pp. 182, 249, 379, 574).

BILLS AND NOTES—

Action on promissory note—Denial of execution—Not inconsistent with claim of no consideration—When both defenses are made—Plea in general terms—Error to require defendant to make same definite and certain, when. See *Booco v. Mansfield*, 121.

BONDS—

Action on bond of executor—Bond approved by probate court—Bond recites appointment of executor and directions as to execution of administration by executor—Sureties on such bond estopped to deny due appointment of executor—In an action on the bond of one who was appointed executor by the probate court, the bond being approved by said court and containing a recital that the principal therein had been appointed executor of the last will and testament of the testatrix, and also containing a condition that "the said principal as executor as aforesaid shall administer according to law and the will of the testatrix all her goods, chattels, rights and credits, and the proceeds of all her real estate that may be sold for the payment of her debts or legacies which shall or may come to the possession of the executor or to the possession of any other person for her," and upon which appointment and giving of said bond assets of the estate passed into the hands of the principal as such executor, the sureties on such bond

 Bonds—Burden of Proof.

BONDS—Continued.

will be estopped from showing in defense that their principal was not duly appointed as executor, or that the will was not duly probated. *Hoffman, Admx., et al. v. Fleming*, 143.

Party granted new trial—On giving bond to secure possible judgment—Bondsmen estopped to deny validity of bond. See *Brenzinger v. Bank*, 242.

Power to issue bonds for city hospital is corporate power—Inhibited by Sec. 1, Art. 13, Const.—No exception on account of emergency. See *Cincinnati v. Trustees (Hospital)*, 440.

BOARD OF CONTROL—

Act of March 16, 1891, is a special act conferring legislative power (in city of Cleveland) and is unconstitutional. See *State v. Beacom*, 491.

BOUNDARIES—

Section 218-223, Rev. Stat., attempting to make maps *prima facie* evidence unconstitutional, when—Application of Sec. 19, bill of rights. See *State v. Cincinnati Tin & Japan Co.*, 182.

BRIDGES—

1. *Construction of bridge over Maumee river—Act of April 14, 1891, 94 O. L. 175 in conflict with Art. 13, Sec. 1, Const.*—The act of the general assembly (94 O. L. 175), supplementing Revised Statutes, section 2835, and which provides, "That any city of the third grade of the first class may, subject to the provisions herein contained, construct, reconstruct, enlarge or repair a bridge or bridges across any navigable river or rivers, passing into or through such city," etc., is a special act applying only to the city of Toledo. Said act confers corporate powers and is in conflict with article 13, section 1, of the constitution of Ohio. *Platt v. Craig*, 75.

2. *Also in conflict with Art. 2, Sec. 26, of the constitution*—The said act being legislation upon a subject-matter of a general nature, and being local in its operation, and it not appearing that any such local and temporary emergency exists as to justify and require special legislation, the act is in conflict with article 2, section 26, of the constitution of Ohio. *Ib.*

BURDEN OF PROOF—

Proceedings in contempt against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability. See *State, etc. v. Cook*, 566.

See also EVIDENCE (p. 182).

Canal Lands—Certificate of Stock.

CANAL LANDS—

1. *Action by state to recover canal lands—State must introduce specifications of canals, but not epitome of specifications—*In an action by the state for the recovery of canal lands, it is proper for the state to introduce in evidence the specifications and rules for the construction of the canals, so as to show the dimensions of the canals and banks, but an epitome of such specifications and rules prepared by the canal commission is not competent evidence. *State v. Cincinnati Tin & Japan Co.*, 182.
2. *Section 218-223, Rev. Stat., attempting to make maps prima facie evidence unconstitutional, when—Application of Sec. 19, bill of rights—*Section 218-223, Bates' Statutes, in so far as it attempts to make the findings, maps, plats, and surveys prepared by the canal commission competent or *prima facie* evidence of the truth of such findings, or the boundaries of such lands, or that the state has the ownership of such lands, or an interest therein, is unconstitutional and void, being in conflict with section 19 of the bill of rights, and section 28 of article 2 of the constitution. *Ib.*
3. *State to recover canal lands must prove former ownership—*In an action by the state for the recovery of canal lands, the state must first prove by competent evidence that the lands in question were formerly part of the canal system of the state, and then the burden shifts to the defendant to show that he has in some lawful manner acquired title from the state. *Ib.*

CANCELLATION—

See INSURANCE, FIRE (p. 6).

CARRIERS—

*Conductor permitting person to ride on freight train—Does not bind company, when—*A conductor in charge of a train designed exclusively for the carriage of freight, and operating under rules which forbid the carriage of passengers thereon, cannot, by consenting that a person may ride on such train, impose upon the company the duty of exercising toward him the care which it owes to a passenger. *B. & O. S. W. Ry. Co. v. Cor. Adm.*, 276.

CERTIFICATE OF STOCK—

Certificate of stock expressed to be transferable only on the books of company is not negotiable instrument. See *Bank v. Safe & Lock Co.*, 367.

ChamPERTY—Classification of Cities.

CHAMPERTY—

Accounts owned by different holders against same debtor—Contract assigning to one termed trustee for collection upon contingent fee, champertous, when. See *Brown v. Ginn*, 316.

CHARGE TO JURY—

Duty of court in charging jury as to implied novation of contract. See *Union Central Life Ins. Co. v. Hoyer*, 344.

As to measure of damages in action for wrongful death. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

See also **PERJURY** (pp. 35, 38).

CHOSE IN ACTION—

Transfer of warehouse receipt or chose in action—Valid without actual delivery—As collateral security for loan—Pledgor requests first pledgee to transfer security—Sufficient possession—Assignment of pledgor within ninety days after transfer—Not fraudulent—Application of Sec. 6343, Rev. Stat. See *Hunt v. Bode*, 255.

CINCINNATI—

Act of April 26, 1902, to issue bonds for city hospital in Cincinnati is special law conferring corporate power. See *Cincinnati v. Trustees (Hospital)*, 440.

CIRCUIT COURT—

Judgment or final order by court of common pleas which it is without jurisdiction to make—Circuit court may reverse—Exercise of such authority—Notwithstanding finding by circuit court that it is without jurisdiction because the common pleas had been. See *Falconer v. Martin*, 353.

Effect of Royer act on jurisdiction of Supreme Court. See *Slingluff v. Weaver*, 621.

CITIES—

Construction of legislative acts—Classification of cities repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Jones*, 453.

See also **MUNICIPAL CORPORATIONS** (p. 453).

CLASSIFICATION OF CITIES—

Construction of bridge over Maumee river—Act of April 14, 1891, 94 O. L., 175, in conflict with Art. 13, Sec. 1, and Art. 2, Sec. 26, of the constitution. See *Platt v. Craig*, 75.

 Classification of Cities—Common Welfare.

Query, whether Sec. 6, Art. 12, of the constitution is exclusive classification into cities and villages. See *State ex rel. v. Jones*, 453.

Construction of legislative acts—Classification repugnant to Sec. 1, Art. 13, of the constitution. *Ib.*

CLEVELAND—

Act of March 16, 1891, 88 O. L. 105, federal plan law is repugnant to Sec. 1, Art. 13 of the constitution. See *State ex rel. v. Beacom*, 491.

COLLECTOR—

Contingent fee to collector, champertous, when. See *Brown v. Ginn*, 316.

COLLISION—

Passenger injured by sudden stopping of car to avoid collision—*Damnum absque injuria*. See *Cleveland City Ry. Co. v. Osborn*, 45.

COMBINATIONS—

Illegality of combination to regulate prices—Proceeds not tainted with illegality, when. See *Geurinck* 1cot' 94.

COMMERCE—

Illegality of combination to regulate prices—Proceeds not tainted with illegality, when. See *Geurinck v. Alcott*, 94.

COMMERCIAL HOSPITAL—

Of Cincinnati—Act of April 26, 1902, invalid. See *Cincinnati v. Trustees (Hospital)*, 440.

COMMON CARRIERS—

See CARRIERS (p. 276).

COMMON PLEAS COURT—

Rule as to enforcement of judgment by attachment in contempt where decree is remanded by circuit court to common pleas court. See *State, etc. v. Cook*, 566.

COMMON WELFARE—

Protection of life and property from incompetency of engineers, etc.—Act of March 1, 1900, 94 O. L., 33—In conflict with common welfare clause of constitution; also with Sec. 2, bill of rights, and Sec. 1, Art. 2, Const. See *Harmon v. State*, 249.

 Compensation for Land—Constitutional Law.

COMPENSATION FOR LAND—

See ASSESSMENTS (p. 379).

COMPLAINT—

Proceedings in contempt against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability to pay. See *State, etc. v. Cook*, 566.

CONDITIONAL SALES—

Sale of goods—Title passes immediately, when—Contra rule. See *Bonham v. Hamilton*, 82.

CONSIDERATION, FAILURE OF—

See PROMISSORY NOTE (p. 121).

CONSOLIDATION OF ACTIONS—

See ACTIONS (p. 360).

CONSTITUTIONAL LAW—

1. *Power of assessment by cities—Sec. 6, Art. 13, Const.—Limitation by Sec. 19 of article 1*—The limitation of section 19 of article 1 of the constitution on section 6 of article 13 as to assessments, goes to the full extent of prohibiting the raising of money directly or indirectly by assessment to pay compensation, damages or costs for lands appropriated by the public for public use. *Railway v. Cincinnati*, 62 Ohio St., 465, approved and followed. *Dayton v. Bauman*, 379.
2. *Limitation does not prohibit assessments within benefits*—Said limitation does not affect or prohibit the raising of money by assessment to pay for surface improvements of streets, sewers, etc., so long as the assessment does not exceed the special benefits conferred. *Walsh v. Barron*, 61 Ohio St., 15, approved and followed. *Ib.*
3. *Construction of legislative acts—Classification of cities—Repugnant to Sec. 1, Art. 13 of constitution*—All legislative acts relating to the same subject-matter should be construed together; and, since all the acts relating to the classification of municipalities and their reclassification, and the division of classes into grades, evince the legislative intention that municipalities having substantially the same conditions and characteristics shall not enter and remain in the same class, such acts are ineffectual to designate classified recipients of corporate power, and an act to confer such power upon a single city, by such classification, is repugnant to section 1

Constitutional Law.

- of article 13 of the constitution, which ordains that: "The general assembly shall pass no special act conferring corporate powers." *State ex rel. v. Jones*, 453.
4. *Act to organize and support police force of a city confers corporate power*—A legislative enactment to provide for the organization and support of a police force for a city, the expenses thereof to be paid by a tax levied upon all taxable property within such city, confers corporate powers. *Ib.*
 5. *Act of April 27, 1902, is void*—The act of April 27, 1902, providing for the reorganization of the board of police commissioners of the city of Toledo, and the appointment of such commissioners by the governor, being a special act conferring corporate powers, is void. *Ib.*
 6. *Query as to Sec. 6, Art. 12, of the constitution*—Whether the provisions of the sixth section of article 13, ordaining that: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws," is an exclusive classification of municipalities into cities and villages, we do not determine. *Ib.*
 7. *Query as to invalidity on other grounds*—Nor do we determine whether the act referred to is void because violative of the principles of local government, or because conferring upon the governor powers which he is not competent to receive and exercise. *Ib.*
 8. *Protection of life and property from incompetency of engineers, etc.*—Act 94 O. L., 33—Invalid as in conflict with Sec. 2 of the bill of rights and Sec. 1, Art. 2 of the constitution—The act of March 1, 1900, 94 O. L. 33, entitled "an act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named," known as the Roberts law, is in conflict with the common welfare clause of the constitution and also in conflict with Sec. 2 of the bill of rights, and Sec. 1 of Art. 2, and is therefore unconstitutional and void. *Harmon v. State*, 249.
 9. *Construction of bridge over Maumee river*—Act of April 14, 1891, 64 O. L. 175, in conflict with Art. 13, Sec 1, Const.—The act of the general assembly, 94 O. L. 175, supplementing Sec. 2835, Rev. Stat., and which provides: "That any city of third grade of the first class may, subject to the provisions herein contained, construct, reconstruct, enlarge or repair a bridge or bridges across any navigable river or rivers, passing into or through such city," etc., is a special act applying only to the city of Toledo, said act confers corporate powers and is in conflict with Art. 13, Sec. 1, of the constitution of Ohio. *Platt v. Craig*, 75.

 Constitutional Law.

CONSTITUTIONAL LAW—Continued.

10. *Also in conflict with Art. 2, Sec. 26 of the constitution*—The said act being legislation upon a subject-matter of a general nature, and being local in its operation, and it not appearing that any such local and temporary emergency exists as to justify and require special legislation, the act is in conflict with Art. 2, Sec. 26 of the constitution of Ohio. *Ib.*
11. *Duty and power of appointment conferred by legislature—Art. 2, Sec. 27, Const.—Function is ministerial, not executive*—The duty and power of making appointment to fill a vacancy in the office of lieutenant governor is not specially conferred on the executive branch of the government by the constitution and rests wherever the legislature may vest it—Article 2, Section 27. Such duty being imposed on the governor by statute, it is not an executive function, but is a ministerial duty. *State ex rel. v. Nash, Governor*, 612.
12. *State is sovereign except as limited by constitution*—The state is a sovereignty, with sovereign powers, except as limited by the constitution of the United States. *Southern Gum Co. v. Laylin*, 578.
13. *Rule as to limitation of power of general assembly to tax privileges and franchises*—While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare. *Ib.*
14. *Limitation of such taxes not to exceed reasonable value—Determination in general assembly—Finally in courts*—By reason of these limitations a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchises originally conferred, or its continued annual value hereafter—The determination of such value rests largely in the general assembly, but finally in the courts. *Ib.*
15. *Excise tax may be imposed, when*—An excise tax may also be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption, in part at least, of the individuals composing such body from liability for its debts. *Ib.*
16. *Franchise tax may be imposed upon domestic and foreign corporations*—A franchise tax may be imposed by the general

 Constitutional Law.

- assembly upon corporations, both domestic and foreign, doing business in this state. *Ib.*
17. *Tax of one-tenth of one per cent. on capital stock—Act of April 11, 1902, valid*—The tax of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock of corporations as provided for in the act of April 11, 1902, entitled "an act to require corporations to file annual reports with the secretary of state, and to pay annual fees therefor" is a franchise tax and not a tax on property. Said act is a valid constitutional law. *Ib.*
18. *Power to issue bonds for city hospital is corporate power*—The power to issue bonds to raise funds for the repair and extension of a hospital belonging to a city, and, to levy a tax upon all the taxable property within such city, for their payment, is corporate power. *Cincinnati v. Trustees (Hospital)*, 440.
19. *Conferring of corporate power inhibited by Sec. 1, Art. 13, of the constitution*—The conferring of such power by special act is inhibited by section 1 of article 13 of the constitution, which ordains that "The general assembly shall pass no special act conferring corporate powers," and to the effectiveness of the inhibition it is immaterial whether the act designates as the donee of such power the municipality itself, or an agency through which it ordinarily acts, or such extraordinary agency as a board of trustees. *Ib.*
20. *No exception on account of emergency*—The comprehensive terms of this section do not admit of any exception on account of any supposed or real emergency. *Ib.*
21. *Act of April 29, 1902, regulating Cincinnati hospital is void*—The act of April 29, 1902, entitled "An act to supplement an act entitled 'An act regulating the Commercial Hospital of Cincinnati' (now the Cincinnati Hospital), passed March 11, 1861," is void because repugnant to this section of the constitution. *Ib.*
22. *Act to limit compensation in certain county—Of a general nature and void—Sec. 26, Art. 2, Const.*—The act "to limit the compensation of county officers in Holmes county," passed April 26, 1898 (93 O. L., 660), is a law of a general nature which does not operate uniformly throughout the state; and it is therefore in violation of the constitution, article 2, section 26. *State ex rel. Guilbert v. Yates, ante*, p. 546, approved and followed. *State ex rel. v. Garver*, 555.
23. *Act to take effect when majority of votes declare in its favor—Passed upon approval of authority other than general assembly—Unconstitutional*—An act of the general assembly

 Constitutional Law.

CONSTITUTIONAL LAW—Continued.

not coming within the exceptions stated in the constitution, article 2, section 26, which is passed to take effect and be in force when a majority of the voters at an election shall declare in favor of a salary law, and if a majority of the voters do not so declare to be void, is passed to take effect upon the approval of authority other than the general assembly, and it is therefore unconstitutional and void. *Ib.*

24. *County officers not local officers—Part of state organization—Subject of compensation not one of local nature—Must operate uniformly*—County officers are not local officers, but are a part of the permanent organization of the government of the state, and the subject of compensation to county officers is not local in its nature, and an act of the general assembly upon that subject is a law of a general nature which must operate uniformly throughout the state. *Pearson et al. v. Stephens et al.*, 56 Ohio St., 126, overruled. *State ex rel. v. Yates*, 546.

25. *Section 26, Art. 2 of Const.—Invalidity of acts of April 22, 1896, and March 29, 1898*—The "act relating to the duties and compensation of certain county officers in Pickaway county," passed April 22, 1896 (92 O. L., 597), and the act amending sections 1, 2, and 5, thereof, passed March 29, 1898 (93 O. L., 507), are unconstitutional, being in conflict with the first clause of section 26, article 2, of the constitution. *Ib.*

26. *Act of March 16, 1891, is a special act conferring legislative power (in the city of Cleveland)—Is repugnant to section 1 of article 13 of constitution—Constitutional law*—The act of March 16, 1891, entitled: "An act to provide a more efficient government for cities of the second grade of the first class," (88 Ohio Laws, 105) and the acts amendatory thereof, being special acts conferring corporate powers, are repugnant to section 1 of article 13 of the constitution. *State ex rel. Knisely et al. v. Jones et al.*, ante, 453; *State ex rel. v. Beacom*, 491.

27. *Section 218-223, Rev. Stat., attempting to make maps prima facie evidence unconstitutional, when—Application of Sec. 19, bill of rights*—Section 218-223, Bates' Statutes, in so far as it attempts to make findings, maps, plats and surveys prepared by the canal commission competent or *prima facie* evidence of the truth of such findings, or boundaries of such lands, or that the state has the ownership of such lands, or an interest therein, is unconstitutional and void, being in conflict with Sec. 19, bill of rights, and Sec. 28, Art. 2 of the constitution. *State v. Cincinnati Tin & Japan Co.*, 182.

 Constitutional Law.

28. *Property interest of abutting owner in street—Compensation*—An owner of a lot abutting on such street has a property interest in the street in front of his lot which cannot be taken against his will except upon terms provided by the constitution, viz.: that a compensation shall first be made in money or by a deposit of money. *Crawford v. Delaware*, 7 Ohio St., 459; *Railway Co. v. Cumminsville*, 14 Ohio St., 523; and *Railway Co. v. Lawrence*, 38 Ohio St., 41, approved and followed. *Callen v. Electric Light Co.*, 166.

29. *Placing of poles on curb by private lighting company—Abuse of property rights, when—Sec 19, bill of rights*—The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner within the meaning of Sec. 19 of the bill of rights. And such placing of poles, lines and wires is none the less an unauthorized taking even though it be consented to by city authorities. *Ib.*

30. *Lot owner's right to injunction*—And where it appears that the acts of the lighting company, in so placing its poles, lines and wires were done without the knowledge or consent of the lot owner, and that their maintenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance and an order for removal. *Ib.*

Corporate powers embrace all the powers which, within the observation of those who framed and adopted the constitution, were conferred upon and exercised by all the cities of the state. See *State ex rel. v. Jones*, 489.

While it is provided that all laws of a general nature shall have uniform operation throughout the state, if the constitution had been intended to prohibit absolutely all special legislation, it would have been so expressed; instead of providing that the general assembly shall pass no special act conferring corporate power, it would have provided that the general assembly should pass no special laws. The inclusion of qualifying words must have been deliberate and intentional. But the local and temporary emergency must be a real exigency, and not a mere excuse for special legislation. See *Platt v. Craig*, 75, 79.

The constitution must be construed in the light of the popular and received signification of its word. Because it emanates from the people it must be construed as the people must have

 Constitutional Law—Contracts.

CONSTITUTIONAL LAW—Continued.

understood it. The terms "general" and special," referring to laws, must, therefore, be understood and applied in their ordinary and non-technical sense. *Ib.* (p. 77).

CONTEMPT—

1. *Proceedings in contempt—Against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability—*In a proceeding in contempt against a party who has refused to comply with a money decree for alimony, it is not essential that the complaint allege that the party is able to pay the money. The decree imports a finding of the court that he is able to pay, and the burden is on him, by allegation and proof, to establish his inability. *State, etc., v. Cook*, 566.
2. *Money decree for alimony not a debt within constitutional inhibition against imprisonment—Is punishable order under Sec. 5640, Rev. Stat., for contempt—*A final money decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt, but is such an order as that, under favor of section 5640, Revised Statutes, punishment as for a contempt may follow a willful failure to comply with it. *Ib.*
3. *Rule as to enforcement of judgment by attachment where decree is remanded by circuit court to common pleas—*Where such decree for alimony is rendered by the circuit court, and the cause remanded by that court to the court of common pleas for execution, a proceeding to enforce the judgment by attachment for contempt is properly brought in the court of common pleas. *Ib.*

CONTINGENT FEE—

See *CHAMPERTY* (p. 316).

CONTRACTS—

1. *Contract by correspondence—Order given in pursuance thereto—Cannot change the contract, when—*All the terms of a contract being definitely settled by correspondence an order given by one of the parties pursuant thereto should not be regarded as changing the contract unless such change clearly appears to be intended. *Bellaire Stove Co. v. Midland Steel Co.*, 1.
2. *Contract of employment—May be discharged as to employer by assumption of third person with knowledge and consent of employe—*A written contract whereby one party employs an-

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other to render services for a fixed period and at a stated rate of compensation, may be discharged as to the employer by the assumption of its obligations to the employe by a third person with the knowledge, consent and to the acceptance of the employe, and such consent and acceptance may rest in parol. *Union Central Life Ins. Co. v. Hoyer*, 344.

3. *Consent may be proved by parol or implication*—The consent to and acceptance of the terms of such contract of novation, need not be express, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter. *Ib.*
4. *Duty of court in charging jury as to implied novation of contract*—*Law of contracts*—*Rules of procedure*—Where such facts, circumstances and course of conduct are in dispute between the parties, it was error for the court to refuse to charge the jury, that the consent to and acceptance of the terms of the contract of novation as to him, might be implied from the attending facts and circumstances and the conduct of the parties thereafter; and it was error to charge in its stead, that the new contract was not binding upon the employe unless he was a party to it, or agreed to accept under it. *Ib.*

Oil lease requiring certain wells to be completed within certain time—Otherwise to become void unless second party make monthly payments—Not an obligation to pay rental. See *Van Etten v. Kelly*, 605.

Accident insurance policy—Restriction as to entering or leaving moving trains—Plaintiff injured when about to step on car—Application of rule—Personal injury—Construction of contracts. See *Huston v. Insurance Co.*, 246.

Accounts owned by different holders against same debtor—Contract assigning to one termed trustee for collection upon contingent fee, champertous, when. See *Brown v. Ginn*, 316.

Contract whereby different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not real party in interest, when—Secs. 4993 and 4995, Rev. Stat. *Ib.*

Employe discharged before expiration of service because of default of duty—Actual injury need not be shown by employer. See *Beckman v. Garrett*, 136.

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE (p. 509).

COPARTNERSHIP—

See CORPORATIONS (p. 94).

 Corporate Power—Corporations.

CORPORATE POWER—

See **POWERS** (pp. 440, 453, 489).

CORPORATIONS—

1. A corporation cannot be a member of a copartnership. *Geurinck v. Alcott*, 94.
2. *Credit due two corporations united for joint business—Not partnership assets*—Where two corporations by agreement contribute capital to carry on a joint business in an assumed name, the net profits to be equally divided, such combination is not a partnership, and credits due thereto are not partnership assets, but belong to the two corporations. *Ib.*
3. *Money in hands of third person for two such corporations—Half belongs to each—Garnishment*—Where money is held by a third person for such two corporations, and the same is garnished to pay the individual debt of one of them, and, the disclosures being satisfactory, an action is brought against such third person and the other corporation as garnishee, both answer, and both fail to claim that such other corporation has any interest in the money, and the cause is tried upon the pleadings and testimony, it is not error of law for the court to find that one-half of such money belongs to the debtor corporation, and render judgment accordingly. *Ib.*
4. *Certificate of stock not a negotiable instrument, when*—A certificate of stock of a corporation expressed on its face to be transferable only on the books of the company at its office, personally, or by attorney, on surrender of this certificate, and transferred in blank upon its back, is not a negotiable instrument. *Farmers' Bank v. Safe and Lock Co.*, 367.
5. *Certificate issued to secretary of company—By him assigned and delivered to bona fide holder—Not transferred on books—Fraudulently reobtained and delivered to third party—First assignee real owner*—Where such a certificate of stock is issued to the secretary of the company, the stock standing in his name upon the books, and such holder assigns the same to a bona fide taker thereof, by executing an assignment on the back blank as to the name of the assignee, and delivers the certificate so assigned to such assignee, and then afterwards fraudulently obtains possession of such certificate by abstracting it from the president's drawer in the safe of the company, where it had been placed by the president, and pledges it to another for his own debt, and the creditor accepts such pledge without inquiry, or attempts to have the stock transferred to him on the books, such first assignee

 Corporations—County Commissioners.

will, in the absence of culpable negligence on his part proximately contributing to the deceit, be held to be the real owner of the certificate, although such second pledgee has acted in good faith and on the belief that his debtor was the real owner of the stock. *Ib.*

Rules as to limitation of power of general assembly to tax privileges and franchises—Not to exceed reasonable value—Determination by general assembly—Finally by courts—Excise and franchise tax may be imposed, when—Tax of one-tenth of one per cent. on capital stock valid—Act of April 11, 1902. See *Southern Gum Co. v. Laylin*, 578.

CORPUS DELICTI—

Indictments for perjury—To warrant conviction there must be at least one witness to *corpus delicti*, with corroborating witness or circumstantial evidence. See *State v. Courtright*, 85.

CORROBORATING PROOF—

See PERJURY (pp. 35, 38).

COSTS—

See ASSESSMENTS (p. 379).

COUNTIES—

Apportionment of railroad rolling stock among counties for taxation. See *State ex rel. v. Aldridge*, 598.

COUNTY COMMISSIONERS—

1. *Compensation of county commissioners—For expenses in official duty—Sec. 897, Rev. Stat.*—The expenses which are authorized to be paid a county commissioner, by the last clause of section 897 of the Revised Statutes, include only his official expenses "actually paid in the discharge of some official duty," as distinguished from those incurred for his personal comforts and necessities. He has no valid claim against the county, or its funds, beyond the per diem compensation and mileage allowed, for any of his personal expenses. *Richardson v. State*, 108.

2. *Expenses of personal character though incurred while engaged in county business*—Expenses incurred for railroad fare, livery hire, charges for the use of his own conveyance, for the feed and shoeing of horses used by him, and for his board and others of a like nature, are of a personal character, for which no valid claim can be made against the county, although they are incurred while about the business of the county. *Ib.*

 County Commissioners—Criminal Law.

COUNTY COMMISSIONERS—Continued.

3. *Allowance of invalid claims of expense by board and probate judge not a bar to action for recovery*—The allowance of such invalid claim by the board of commissioners, upon the certificate of the prosecuting attorney, and approval of the probate judge, and its payment by the treasurer, is not a bar to an action to recover the money back. *Ib.*

A county commissioner is at liberty under our statute, to adopt and pursue his own method and means of travel. He may, if he chooses, travel by railway when accessible, or by vehicle hired by him or use his own conveyance. But whatever the mode adopted, he must pay all the expenses incurred, and his only source of reimbursement is the amount of mileage allowed him. See *Ib.* 111.

COUNTY OFFICERS—

See OFFICE AND OFFICERS (p. 735, Index).

COURTS—

Proceeding to enforce judgment by attachment in contempt where decree is remanded by circuit to common pleas court is properly brought in the court of common pleas. See *State v. Cook*, 566.

Effect of Royer act on jurisdiction of Supreme Court. See *Slingluff v. Weaver*, 621.

Bond approved by probate court—Sureties estopped to deny due appointment of executor. See *Hoffman v. Fleming*, 143.

Transcript of entries of probate court filed in common pleas court to perfect appeal. See *Falconer v. Martin*, 352.

Duty of court in charging jury as to implied novation of contract. See *Insurance Co. v. Hoyer*, 344.

See also CIRCUIT COURT (p. 353); PROBATE COURTS (pp. 143, 156).

CRIMINAL LAW—

Prosecution for manslaughter—Deceased unintentionally killed—Act of slayer must be prohibited by law—Not sufficient that act was a crime at common law or one of gross or culpable negligence. See *Johnson v. State*, 59.

To warrant conviction for perjury there should be at least one witness to the *corpus delicti* with corroborating witness or circumstantial evidence. See *State v. Courtright*, 35.

Trial of criminal case—Testimony on previous trial by witness not dead, but beyond jurisdiction, not admissible, when. See *State v. Wing*, 407.

See also PERJURY (pp. 35, 38).

 Cross Petition—*Damnum Absque Injuria*.

CROSS PETITION—

Summons on petition sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

DAMAGES—

1. *Passenger injured by sudden stopping of car—Damnum absque injuria*—Where a passenger on a street railway car was thrown from the car and injured by the sudden stopping of the car in the effort to avoid a collision, and by the shock of a collision which was not brought about by the negligence of the defendant, it is *damnum absque injuria*. *Cleveland City Ry. Co. v. Osborn*, 45.

2. *Pecuniary injury to each beneficiary—Aggregate amount—How computed—Father being negligent not entitled to recover for injury to son*—Where there is evidence tending to show that the father of the deceased was guilty of negligence directly contributing to the death of his son, and the court charged the jury that, in arriving at the amount of damages, they should consider the pecuniary injury to each separate beneficiary, first determining the value of the life of the deceased to his father, etc., but that the verdict should be for a gross sum not exceeding ten thousand dollars, it is error to refuse to charge the jury, as requested, that if they should find that the father of the deceased was guilty of negligence directly contributing to the death of his son, the plaintiff could not recover for any pecuniary loss suffered by the father for the death of his son. *Wolf, Admr., v. Railway Co.*, 55 Ohio St., 517, approved and followed. *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

Husband has right of action at common law against one who wrongfully injures his wife—Right not abridged by Secs. 3108 and 3117, Rev. Stat. See *B. & O. R. R. Co. v. Glenn*, 395.

To recover for personal injuries plaintiff must prove culpable negligence, when. See *Cleveland City Ry. Co. v. Osborn*, 45.

See also **ASSESSMENTS** (p. 379).

DAMNUM ABSQUE INJURIA—

Passenger injured by sudden stopping of car to avoid collision—*Damnum absque injuria*. See *Cleveland City Ry. Co. v. Osborn*, 45.

 Debt—Divorce and Alimony.

DEBT—

Money decree for alimony not a debt within constitutional inhibition against imprisonment—Is punishable order under Sec. 5640, Rev. Stat., for contempt. See *State, etc. v. Cook*, 566.

DEBTORS AND CREDITORS—

Certificate of stock issued to secretary of company—By him assigned and delivered to *bona fide* holder—Not transferred on books—Fraudulently reobtained and delivered to third party—First assignee real owner. See *Farmers' Bank v. Safe and Lock Co.*, 367.

Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not a real party in interest, when—Secs. 4993 and 4995, Rev. Stat. See *Brown v. Ginn*, 316.

DECREES—

Proceedings in contempt against party refusing to comply with decree for alimony. See *State, etc. v. Cook*, 566.

DEDICATION—

Title of municipal corporation to streets dedicated—Sec. 2601, Rev. Stat. See *Callen v. Electric Light Co.*, 166.

DESCENT AND DISTRIBUTION—

Testatrix having child living devises all estate to husband—An after-born child will inherit from mother as heir at law. See *German Mutual Ins. Co. v. Lushey*, 233.

DISCHARGE—

See **EMPLOYER AND EMPLOYE** (pp. 136, 344).

DIVORCE AND ALIM

Money decree for alimony not a debt within constitutional inhibition against imprisonment—Is punishable order under Sec. 5640, Rev. Stat., for contempt—A final (money) decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt, but is such an order as that, under favor of Sec. 5640, Rev. Stat., punishment as for a contempt may follow a willful failure to comply with it. State, etc. v. Cook, 566.

Proceedings in contempt against party refusing to comply with decree for alimony—Complaint need not allege party able to pay—Burden on defendant to prove inability. See *State, etc. v. Cook*, 566.

Domestic Corporations—Employer and Employee.

DOMESTIC CORPORATIONS—

See TAXATION (p. 578).

EASEMENTS—

Interurban railroad on side of highway—An interference with easement and right of way of abutting farms, when—Conditions similar to those of steam railways—Effect of construction of electric plant in connection—Injunction. See *Schaaf v. Railway Co.*, 215.

EJECTMENT—

Party having title demising to another—First party cannot maintain action against third party, when. See *State v. Cincinnati Tin & Japan Co.*, 182.

ELECTRIC LIGHT COMPANIES—

Placing of poles, lines and wires on curb by private lighting company abuse of property rights, when—Sec. 19, bill of rights—Lot owner's right to injunction. See *Callen v. Electric Light Co.*, 166.

Effect of construction of electric plant in connection with interurban railway constructed on side of highway—Injunction. See *Schaaf v. Railway Co.*, 215.

EMINENT DOMAIN—

The water taken by a city from a stream for its own use and supplied to its inhabitants, is taken by virtue of its right as a riparian proprietor, and not by virtue of the right of eminent domain. See *Canton v. Shock*, 19, 32.

EMPLOYER AND EMPLOYEE—

Employee discharged before expiration of service because of default in duty—Actual injury need not be shown by employer to justify discharge—Master and servant. See *Beckman v. Garrett*, 136.

Contract of employment—May be discharged as to employer by assumption of third person with knowledge and consent of employee. See *Union Central Life Ins. Co. v. Hoyer*, 344.

Duty of railroad company to employe on track when not in discharge of duty. See *Railway Co. v. Workman*, 509.

Employee held to appreciate dangers from defects—Of which he might have knowledge. See *Pennsylvania Co. v. McCurdy*, 118.

See also MASTER AND SERVANT (p. 118).

Engineers—Error.

ENGINEERS—

Protection of life and property from incompetency of engineers, etc.—Act of March 1, 1900, (94 O. L., 33)—Act invalid as in conflict with section 2 of bill of rights, and section 1 of article 2—*Constitutional law*—The act of March 1, 1900, 94 O. L., 33, entitled "An act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named," known as the Roberts Law, is in conflict with the common welfare clause of the constitution, and also in conflict with section 2 of the bill of rights, and section 1 of article 2, and is therefore unconstitutional and void. *Harmon v. State*, 249.

EQUITY—

Consolidation of several actions for money against same defendant setting up defenses and praying for equitable relief. See *Taylor v. Brick Co.*, 360.

Respective rights of upper and lower proprietors of same stream as to use of water. See *City of Canton v. Shock*, 19.

ERROR—

1. *Royer act*, 93 O. L., 255—*Construed*—The language of the act of May 12, 1902, entitled, "An act to amend section 6710 (as amended 93 O. L., 255) of the Revised Statutes," is plain and free from doubt, and effect must be given to its clear import without regard to the consequences which may result. Its effect is to deprive this court of jurisdiction to review any case in error where the judgment of the lower court has been or may be rendered since the passage of the act, and not coming within its terms. *Slingluff v. Weaver*, 621.
2. *Effect of construction of Royer act*—This court is without jurisdiction to review a judgment of the circuit court rendered June 6, 1902, in a cause in injunction, commenced in the court of common pleas June 2, 1902. *Ib.*

Where the court of common pleas enters a judgment or final order which it is without jurisdiction to make, the circuit court has authority to review it; and that authority is substantially exercised when the circuit court orders dismissal of appeal in the common pleas notwithstanding a finding by the circuit court that it is without jurisdiction because the court of common pleas had been. See *Falconer v. Martin*, 353.

Refusal of temporary injunction not prejudicial error, when—See *Taylor v. Brick Co.*, 360.

Error—Evidence.

Several actions against same defendant—May ask for consolidation and for injunction—Order for consolidation not a final order. See *Taylor v. Brick Co.*, 360.

Incompetent evidence no ground for reversal, when. See *State v. Cincinnati Tin & Japan Co.*, 182.

ESTOPPEL—

To estop state, record must show that state authorized the previous action—For a record of a previous action to which the state was not a party to be available against the state as an estoppel, it must appear that the state by statute expressly authorized the action to be brought or defended, that the officer having the action in charge acted within the scope of such authority, and in no event can the estoppel be broader than the authority so given by statute. In such cases the estoppel is by statute rather than *in pais*. *State v. Cincinnati Tin & Japan Co.*, 182.

Party granted one new trial—On condition of giving bond to secure possible judgment—Bondsman estopped to deny validity of bond. See *Brenzinger v. Bank*, 242.

Action on bond of executor—Bond approved by probate court—Bond recites appointment of executor and directions as to administration by executor—Sureties estopped to deny due appointment of executor or probate of will. See *Hoffman v. Fleming*, 143.

EVIDENCE—

1. Action for personal injury—Plaintiff must prove culpable negligence, when—In an action to recover for personal injury occasioned by negligence of the defendant, the plaintiff cannot recover by merely proving an act of the defendant which was the proximate cause of the injury; but to authorize a recovery, the plaintiff must also show that such act resulted from culpable negligence by the defendant. *Cleveland City Railway Co. v. Osborn*, 45.
2. Trial court to exercise power of refusal to permit questions with great caution—The trial court should exercise with great deliberation and caution the power of withdrawing or refusing to submit questions propounded; and although the questions must be such that the answers thereto will establish ultimate and determinative facts, and not such as are only of a probative character, yet questions the answers to which establish probative facts from which an ultimate material fact may be inferred as a matter of law, should be allowed. *Schweinfurth, Admr., etc., v. Railway Co.*, 60 Ohio

Evidence.

EVIDENCE—Continued.

St., 215, explained and qualified. *The Cleveland & Elyria Electric R. R. Co. v. Hawkins*, 64 Ohio St., 391, approved and followed: *Gale v. Priddy*, 400.

3. *Incompetent evidence—No ground for reversal, when—*Where a plaintiff fails to introduce any evidence tending to prove his cause of action, and the defendant introduces incompetent evidence over the objection of the plaintiff, the introduction of such evidence is no ground for reversing the judgment, because the judgment is properly founded upon the failure of proof, unaided by the incompetent evidence. *State v. Cincinnati Tin & Japan Co.*, 182.

4. *Trial of criminal case—Testimony in previous trial by witness not dead—But beyond court's jurisdiction—Not admissible, when—Criminal procedure—*In the trial of a criminal case, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or limits of the state, is not admissible unless it appear to the satisfaction of the trial court, that the witness is absent through the connivance, or by the procurement of the accused. *State of Ohio v. Wing*, 407.

A record of the appointment of an executor in Ohio for the estate of a person "late of Brooke county, West Va.," does not impeach itself by clearly showing that testatrix was not a resident of the jurisdiction which made the appointment. The word *late* is not used in the sense of *last*, but of *recently* or *formerly*. See *Hoffman v. Fleming*, 143, 157.

To estop state, record must show that state authorized previous action—Estoppel by statute, not *in pais*. See *State v. Cincinnati Tin & Japan Co.*, 182.

Action by state to recover canal lands—State must introduce specifications of canal, but not epitome of specifications—Sec. 218-223, Rev. Stat.—Attempting to make maps *prima facie* evidence unconstitutional, when—Application of Sec. 19, bill of rights—State to recover lands must prove former ownership. *Ib.*

Minutes of taxing board, in apportioning rolling stock of railroad for taxation, not conclusive—Real facts may be shown by parol. See *State ex rel. v. Aldridge*, 598.

Consent to acceptance of terms of contract of novation may be proved by parol or by implication. See *Union Central Life Ins. Co. v. Hoyer*, 344.

Sending a book of railway rules to be used by jury when only a few of the rules have been offered in evidence is improper. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509, 546.

Evidence—Executors and Administrators.

As to existence of city ordinance in action for negligence—
Parol testimony not admitted, when. *Ib.*

Evidence concerning warning signals—Rule as to reasonable
precaution by plaintiff erroneous—Charge to jury as to evi-
dence—Contributory negligence of deceased. *Ib.*

There is no presumption that an agent to procure a policy of
insurance has authority; after the policy is issued and deliv-
ered, to receive notice of cancellation. Such authority may,
however, be directly given or may be inferred from course
of dealing. See *Johnson v. Insurance Co.*, 6.

To warrant conviction under indictment for perjury there
should be at least one witness to *corpus delicti*, with cor-
roborating witness or circumstantial evidence. See *State*
v. Courtright, 35.

See also PERJURY (pp. 35, 38).

EXCISE TAX—

May be imposed upon corporations to compensate state for
additional burden caused by aggregation of capital in arti-
ficial body and partial exemption of individuals—Rule as to
limitation. See *Southern Gum Co. v. Laylin*, 578.

EXECUTIVE DUTIES—

Duty and power of appointment conferred by legislature—Art.
2, Sec. 27, Const.—Function is ministerial, not executive.
See *State ex rel. v. Nash, Governor*, 612.

EXECUTORS AND ADMINISTRATORS—

*Personal representative of an executor—Not liable to adminis-
trator de bonis non, when—Section 6020, Rev. Stat.—Inter-
pretation of statute—*The personal representative of an exe-
cutor who died in office, before an account was due or filed
in reference to the trust, is not liable, under section 6020,
Revised Statutes, to the administrator *de bonis non* of the tes-
tator in an action brought against him alone as such per-
sonal representative, to recover for unadministered assets
of the estate of such testator, where none of such assets came
into the possession or under the control of such personal rep-
resentative. *Jones, Admr. v. Willis, Admr.*, 114.

A record of the appointment of an executor in Ohio for the es-
tate of a person "late of Brooke county, West Va.," does not
impeach itself by clearly showing that testatrix was not a
resident of the jurisdiction which made the appointment.
The word *late* is not used in the sense of *last*, but of *recently*
or *formerly*. See *Hoffman v. Fleming*, 143, 157.

Executors and Administrators—Foreclosure.

EXECUTORS AND ADMINISTRATORS—Continued.

Whatever is done by the probate court in matters of probate of wills, appointment of executors and administrators, and directing and controlling the accounting of such executors and administrators, is presumptively within the jurisdiction of the court. *Ib.*

Action on bond of executor—Bond approved by probate court—Bond recites appointment of executor and directions as to execution of administration by executor—Sureties estopped to deny due appointment of executor. *Ib.*

Sale of goods by administrator upon terms of credit, with approved security—Failure of security and resale—Title does not pass, when—Replevin will not lie. See *Bonham v. Hamilton*, 82.

EXEMPTIONS—

Lands owned by municipality—Not exempt from taxation unless used in municipal function—Same when lands leased. See *Cincinnati v. Lewis*, 49.

FEDERAL PLAN LAW—

Act of March 16, 1891, 88 O. L. 105, is repugnant to Sec. 1, Art. 13 of the constitution. See *State ex rel. v. Beacom*, 491.

FEES AND SALARIES—

County officers not local officers—Part of state organization—Subject of compensation not one of local nature—Laws must operate uniformly—Act 92 O. L., 597 and 93 O. L., 507, relating to Pickaway county, invalid. See *State ex rel. v. Yates. Aud'r*, 546.

Compensation of county commissioners for expenses in official duty—Sec. 897, Rev. Stat.—Expenses of personal character though incurred while engaged in county business—Allowance of invalid claim by board—Not a bar to recovery. See *Richardson v. State*, 108.

See also **COUNTY COMMISSIONERS** (pp. 108, 111).

FINAL ORDERS—

Several actions against same defendant—May ask for consolidation and for injunction—Order for consolidation not a final order. See *Taylor v. Brick Co.*, 360.

FORECLOSURE—

Without proper averments or prayer upon which to found personal judgment—Error to decree that defendant shall pay

Foreclosure—Gas and Oil Leases.

whole amount and award execution therefor. See *Southward v. Jamison*, 290.

To bind party assuming and agreeing to pay mortgage debt—Pleadings. *Ib.*

FOREIGN CORPORATIONS—

See TAXATION (p. 578).

FRANCHISES—

Rule as to limitation of power of general assembly to tax franchises and privileges—not to exceed reasonable value—Determination in general assembly—Finally in courts—Excise and franchise tax may be imposed, when. See *Southern Gum Co. v. Laylin*, 578.

FRAUDS—

Certificate of stock issued to secretary of company—By him assigned and delivered to *bona fide* holder—Not transferred on books of company—Fraudulently reobtained and delivered to third party—First assignee real owner. See *Farmers' Bank v. Safe & Lock Co.*, 367.

FRAUDULENT TRANSFER, NOT—

Transfer of warehouse receipt as security—Within ninety days of assignment, not fraudulent, when. See *Hunt v. Bode*, 255.

FREIGHT TRAINS—

See CARRIERS (p. 276).

GARNISHMENT—

Money in hands of third person for two corporations united for joint business—Half belongs to each—Garnishment. See *Geurinck v. Alcott*, 94.

Illegality of combination to regulate prices—Proceeds not tainted with illegality, when—Subject to garnishment. *Ib.*

GAS AND OIL LEASES—

Oil lease requiring certain wells to be completed within certain time—Otherwise to become void unless second party make monthly payment—Not an obligation to pay rental—Action will not lie, when—An oil lease which required certain wells to be completed within stated times, contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed."

 Gas and Oil Leases—Homicide.

GAS AND OIL LEASES—Continued.

Held, that this did not constitute a promise or obligation to pay rental; and held further, that the lessee had the option to complete wells, or pay rentals, to keep the lease alive; and that upon breach of the agreement to complete wells, no action would lie for the recovery of rentals. *Van Etten v. Kelly*, 605.

GENERAL LAWS—

Act relating to compensation of county officers is a law of a general nature—Must operate uniformly. See *State ex rel. v. Yates, Admr.*, 546; *State ex rel. v. Garver*, 555.

See also CONSTITUTIONAL LAW (p. 704, Index).

GOVERNOR—

Whether act of April 27, 1902 (Toledo police board), authorizing appointment of board by governor, confers upon such office powers which he is not competent to receive, *query*. See *State ex rel. v. Jones*, 453.

Mandamus may issue to compel governor to perform ministerial duty, but not to control discretion—Duty and power of appointment to fill vacancy in office of lieutenant governor—Art. 2, Sec. 27, Const.—Function is ministerial, not executive—Vacancy must be filled under Sec. 81, Rev. Stat. See *State ex rel v. Nash, Governor*, 612.

HEIRS—

Testatrix having child living devises all estate to husband—An after-born child will inherit from mother as heir at law. See *German Mutual Ins. Co. v. Lushey*, 233.

HIGHWAYS—

Interurban railroad on side of highway—An interference with easement and right of way of abutting farms, when—Conditions similar to those of steam railways—Effect of construction of electric plant in connection—Injunction. See *Schaaf v. Railway Co.*, 215.

HOLMES COUNTY—

Act 93 O. L. 660, relating to compensation of county officers, unconstitutional. See *State ex rel. v. Garver*, 555.

HOMICIDE—

Prosecution for manslaughter—Deceased unintentionally killed—Act of slayer must be prohibited by law—Not sufficient that act was crime at common law or one of gross or culpable negligence. See *Johnson v. State*, 59.

Hospitals—Injunction.

HOSPITALS—

Power to issue bonds for city hospital is corporate power—
Inhibited by Sec. 1, Art. 13, Const.—No exception on account
of emergency. See *Cincinnati v. Trustees (Hospital)*, 440.

HUSBAND AND WIFE—

*Husband has right of action, at common law, against one who
wrongfully injures his wife—Right not abridged by Sections
3108 to 3117, Rev. Stat.—At common law, a husband has a
right of action against one who wrongfully or through
negligence injures his wife, to recover for the resulting
loss of her services, and for his necessary medical, surgical
and other expenses in healing her injuries; and this right
of action is not abridged or affected by the legislation em-
braced in Secs. 3108 to 3117 inclusive of the Revised Stat-
utes. Baltimore & Ohio Railroad Co. v. Glenn, 395.*

IMPLIED CONTRACTS—

See CONTRACTS (p. 344).

IMPRISONMENT—

Money decree for alimony, not a debt within constitutional in-
hibition against imprisonment—is punishable order under
Sec. 5640, Rev. Stat., for contempt. See *State, etc. v. Cook*,
566.

IMPUTED NEGLIGENCE—

Doctrine of, does not prevail in Ohio. See *N. Y. C. & St. L.
Ry. Co. v. Kistler*, 326.

INDICTMENT—

See PERJURY (p. 35).

INJUNCTION—

Placing of poles, lines and wires, by private lighting company,
on curb of street without knowledge or consent of, or com-
pensation to abutting owner—Injunction. See *Callen v.
Electric Light Co.*, 166.

Abutting owner entitled to injunction against construction of
interurban railroad in highway, and electric plant in con-
nection therewith, until compensation is made. See *Schaaf
v. Railway Co.*, 215.

Several actions against same defendants—Defendant may ask
for consolidation of suits and for injunction. See *Taylor v.
Brick Co.*, 360.

Insurance.

INSURANCE—ACCIDENT—

*Accident insurance policy—Restrictions as to entering or leaving moving trains—Plaintiff injured when about to step on car—Application of rule—Personal injury—Construction of contracts—*An accident policy contained this exception: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as motive power." The insured was walking along a railroad track, the ground being slippery and icy, when a freight train overtook him, going slowly, and it occurred to him that he would step on the caboose and ride, and as he was about to step on but before he had touched the car, he slipped and fell and his left foot was crushed by the hind wheels: *Held*, that what he did after the purpose to step on the car caused him to change his conduct from that of walking along the track, to that of making preparation to step on the car, was within the exception, whether he had caught hold of the car or not. *Huston v. Insurance Co.*, 246.

While the meaning of clauses in an accident policy, exempting the company from liability, should be construed with fair strictness against the company, there should be no strained or unnatural construction put upon the acts of the insured to save such acts from coming within such exceptions. See *Huston v. Insurance Co.*, 246, 248.

INSURANCE—FIRE—

1. *Agent of fire insurance companies—Not presumptively authorized to receive notice on cancellation of policy, when—* One engaged in a general fire insurance business, representing a number of companies, may be authorized by an owner desiring to keep his property insured, to except for him the company's notice of cancellation of an existing policy and thereupon to write the risk in another company. Such authority may be directly given, or may be inferred from a course of dealing between the parties involving such transactions. But there is no presumption that the agent to procure a policy of insurance has authority, after he has procured and delivered it to the insured, to receive notice of cancellation and discharge the policy. *Johnson v. Insurance Co.*, 6.

Where at the time a claimed ratification of an unauthorized act took place the rights and liabilities of the parties had become fixed, the intent to ratify, whereby such rights may be affected, must be clearly shown. *Ib.* 6, 18.

Insurance—Jurisdiction.

The election of assured to sue one of two insurance companies does not have the effect of ratifying the act of an insurance agent representing defendant and another company, in entering upon his policy ledger an unauthorized cancellation. *Ib.* 17.

Assent of would-be principal of no effect where act is done by one professing and having no authority as agent. *Ib.* 17.

Contract of employment by insurance company—May be discharged as to employer by assumption of third person. See *Insurance Co. v. Hoyer*, 344.

INTERPRETATION OF LAW—

See JURISDICTION OF SUPREME COURT (p. 621).

INTEREST—

Treasurer of school district must account for interest on deposits—Sec. 6841, Rev. Stat. See *Eshelby v. Cincinnati Bd. of Ed.*, 71.

INTERURBAN RAILWAYS—

See STREET RAILWAYS (p. 215).

JOURNAL ENTRY—

See NOTICE OF APPEAL (p. 57).

JUDGMENT—

Summons issued on petition—Sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

Incompetent evidence no ground for reversal, when. See *State v. Cincinnati Tin & Japan Co.*, 182.

Party granted new trial—By giving bond to secure possible judgment. See *Brenzinger v. Bank*, 242.

JUDICIAL INVESTIGATION—

Object of in construction of statute is to ascertain intent of legislature. See *Stingluff v. Weaver*, 621.

JUDICIAL SALES—

Sale of goods by administrator upon terms of credit with approved security—Failure of security and resale—Title does not pass, when—Replevin will not lie. See *Bonham v. Hamilton*, 82.

JURISDICTION—

Whatever is done by the probate court in matters of probate of wills, appointment of executors and administrators and di-

 Jurisdiction—Lieutenant Governor.

JURISDICTION—Continued.

recting and controlling the accounting of such executors and administrators, is presumptively within the jurisdiction of the court. See *Hoffman v. Fleming*, 143, 156.

Summons issued on petition sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

Rule as to enforcement of judgment by attachment in contempt where decree is remanded by circuit court to common pleas—Jurisdiction in common pleas. See *State, etc. v. Cook*, 566.

Testimony in previous trial by witness not dead but beyond court's jurisdiction. See *State v. Wing*, 407.

JURY—

Equitable division of water between riparian proprietors a question for the jury. See *Canton v. Shock*, 19.

Trial by general or special verdict—Sec. 5201, Rev. Stat.—Mandatory, when. See *Gale v. Priddy*, 400.

See also CHARGE TO JURY (pp. 35, 38, 344, 509).

LANDLORD AND TENANT—

See GAS AND OIL LEASES (p. 605).

LEASES—

See GAS AND OIL LEASES (p. 605).

LEGISLATION—

See STATUTES (pp. 453, 621).

LEGISLATIVE POWER—

See POWERS (pp. 440, 491, 555).

LICENSE—

Employee of railroad company not required to be on main track—Is mere licensee—Subject to all risks—Company owes him no special duty. *Cleveland, A. & C. Ry. Co. v. Workman, Admr.*, 509.

LIENS—

See MARSHALING LIENS (p. 360).

LIEUTENANT GOVERNOR—

Mandamus to fill office of—Private citizen may be relator—Mandamus may issue commanding governor to perform ministerial duty but not to control discretion. See *State ex rel. v. Nash, Governor*, 612.

 Local Government—Marshaling Liens.

LOCAL GOVERNMENT—

Whether act of April 27, 1902, (Toledo police board bill), is violative of the principles of local government, board being appointed by governor, *query*. See *State ex rel. v. Jones*, 453.

MANDAMUS—

1. *Mandamus to fill office of lieutenant governor*—*Private citizen may be relator*—The attorney general not having become such, a private citizen may be the relator in a mandamus proceeding to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large. *State ex rel. v. Nash, Governor*, 612.

2. *Mandamus may issue commanding governor to perform ministerial duty, but not to control discretion*—In such case a writ of mandamus may issue against the governor commanding him to perform a purely ministerial act; but not to control his discretion in the performance thereof. *State ex rel. Whiteman et al. v. Salmon P. Chase, Governor*, 5 Ohio St., 528, approved and followed. *Ib.*

Persons succeeding defendants in office—Without authority to possess property of the office unless act of appointment is valid. See *State ex rel. v. Jones*, 453.

MANSLAUGHTER—

Prosecution for manslaughter—Deceased unintentionally killed—Act of slayer must be prohibited by law—Not sufficient to show act a crime at common law or one of gross or culpable negligence—Criminal law—In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally, while the slayer was in the commission of an unlawful act, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish, that such act so engaged in, was a crime at common law, or one of gross and culpable negligence. *Johnson v. State of Ohio*, 59.

MAPS—

Section 218-223, Rev. Stat., attempting to make maps *prima facie* evidence unconstitutional, when—Application of Sec. 19, bill of rights. See *State v. Cincinnati Tin & Japan Co.*, 182.

MARSHALING LIENS—

Consolidation of several actions for money against same defendant setting up defenses and praying for equitable relief. See *Taylor v. Brick Co.*, 360.

MASTER AND SERVANT—

1. *Employee discharged before expiration of service—Because of default in duty—Actual injury need not be shown by employer—To justify discharge—Master and servant—To justify the discharge of an employe before the expiration of the term of employment, it is sufficient for the employer to show that the employe was guilty of a default in duty whose natural tendency was to injure his business, and actual injury there to need not be shown. Beckman, Jr., et al. v. Garrett, 136.*
2. *Employee held to appreciate dangers from defects—Of which he might have knowledge—Law of master and servant—An employe experienced in the services in which he is engaged is conclusively held to appreciate the dangers which may arise from defects of which he has, or in the exercise of due care might have, knowledge. Pennsylvania Co. v. McCurdy, 118.*
3. *Employee of railroad company not required to be on main track—Is mere licensee—Subject to all risks—Company owes no special duty—An employe of a railroad company, whose duties in the performance of his employment do not require him to be on the main track of the railroad with a three-wheeled handcar called a "speeder," but who so goes upon the main track without any invitation or inducement therefor by the company, but with no objection on the part of the company, is at most a mere licensee, and his use of the track in such manner is subject to all the risks incident to the use of the track by the company, in the same manner it was used at the time the license was granted, and the company does not owe him the duty to especially look out for and protect him, when running its trains, except to use reasonable care to avoid injuring him after discovering him upon the track. Cleveland, A. & C. Ry. Co. v. Workman, Admr., 509.*
4. *Evidence concerning warning signals—Rule as to reasonable precaution by plaintiff—Charge to jury as to evidence—Where the evidence shows that the deceased was struck by a train and killed, at a point about 600 feet from the crossing, it is error to charge the jury that it is for them to determine, from the evidence, whether the statutory signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased; and in such case it is also error to charge the jury that the deceased was bound to use reasonable precautions to detect the approach of trains, and to know that the defendant*

 Master and Servant.

might run a train over the road at that point at any time, "unless lulled into a feeling of security by a failure of the defendant's employees, in charge of its train, to observe the statutory regulations and rules of the company in the manner of running and management of the train, at the time and place of the accident and under the circumstances shown by the evidence." *Ib.*

5. *Contributory negligence of deceased*—Where it is an admitted fact that, at the time of the accident, it was so foggy that it was difficult, if not impossible, to see objects on the railroad more than a few rods distant; and there is evidence tending to show that the deceased took the "speeder" upon the main track for no reason connected with his employment other than his convenience; that after lighting one switch light he rode down the main track toward another switch light on the "speeder," with a companion, in violation of the orders of his superior, the station agent; that there was a side track, or "passing track" from a point near the station to where the other switch light was to be placed, that the deceased could have easily placed the "speeder" upon said side track and reached his destination easily and with safety; and that instead of doing so he went down the main track without keeping any lookout behind him, it is error to refuse to charge the jury that if they find such facts the deceased was guilty of such negligence as would prevent the plaintiff from recovering in the case, unless the defendant could have avoided the injury after discovering the deceased upon the track. *Ib.*

6. *Evidence as to existence of city ordinance—Parol testimony not admitted, when*—An issue in the pleadings being whether an ordinance existed or not, it was error to permit parol proof of the passage of the ordinance; and the error was not cured by the court saying to the jury that the ordinance was a circumstance to be taken into consideration in connection with the other facts and circumstances, in determining whether the defendant was guilty of negligence, or whether the deceased was guilty of negligence which contributed to cause his death. *Ib.*

Action for injury by negligence—Absence of willfulness—Does not lie unless defendant bound to exercise care toward injured—Conductor permitting person to ride on freight train—Does not bind company, when. See *B. & O. S. W. Ry. Co. v. Cox, Admr.*, 276.

Conductor permitting person to ride on freight train—Does not bind company, when. *Ib.*

 Master and Servant—Municipal Corporations.

MASTER AND SERVANT—Continued.

Whatever locomotive engineer would see in discharge of duty, he is chargeable with having seen. See *Railroad Co. v. Kistler*, 327.

MAXIMS—

Damnum absque injuria. See *Cleveland City Ry. Co. v. Osborn*, 45.

MINISTERIAL DUTIES—

Mandamus may issue commanding governor to perform ministerial duty (appoint lieutenant governor), but not to control discretion. See *State ex rel. v. Nash, Governor*, 612.

MORTGAGES—

Mortgage foreclosure—Without proper averments or prayer upon which to found personal judgment—Error to decree that defendant shall pay whole amount and award execution therefor. See *Southward v. Jamison*, 290.

Foreclosure—To bind party assuming and agreeing to pay mortgage debt—Pleadings. *Ib.*

MULTIPLICITY OF SUITS—

See **ACTIONS** (p. 360).

MUNICIPAL CORPORATIONS—

Municipality a riparian proprietor—May use water needed from stream flowing by—Use of water by municipality for domestic purposes—Lower proprietor has no cause for complaint—When water is insufficient for upper and lower proprietors, each entitled to reasonable use—Water should be so divided that each shall bear fair proportion of loss—Municipality cannot diminish flow, to injury of lower proprietor, to supply persons outside municipality or use for manufactories more than a reasonable share—Equitable division, a question for the jury. See *Canton v. Shock*, 19. Inasmuch as a city has the right to supply water to its inhabitants for domestic and manufacturing purposes, the relative rights of riparian proprietors are not affected by the fact that the supply is for pay rather than for nothing. *Ib.* 19, 32.

The water taken by a city from a stream for its own use, and supplied to its inhabitants, is taken by virtue of its right as a riparian proprietor and not by virtue of the right of eminent domain. *Ib.*

Municipal Corporations—Negligence.

Title to streets dedicated—Sec. 2601, Rev. Stat.—Property interest of abutting owner—Compensation—Placing poles on curb by private lighting company—Abuse of property rights—Sec. 19, bill of rights—Lot owner's right to injunction. See *Callen v. Electric Light Co.*, 186.

Query, whether Sec. 6, Art. 12 of the constitution is exclusive classification of municipalities into cities and villages. See *State ex rel. v. Jones*, 453.

Construction of legislative acts—Classification of cities repugnant to Sec. 1, Art. 13 of the constitution. *Ib.*

Lands owned by—Not exempt from taxation unless used in municipal function—Same when lands leased. See *Cincinnati v. Lewis*, 49.

See also ASSESSMENTS (p. 379).

NAVIGABLE RIVERS—

Construction of bridge over Maumee river—Act 94 O. L. 175, in conflict with Art. 13, Sec. 26 of the constitution. See *Platt v. Craig*, 75.

NEGLIGENCE—

1. *Action for personal injuries—Plaintiff must prove culpable negligence, when*—In an action to recover for personal injury occasioned by negligence of the defendant, the plaintiff cannot recover by merely proving an act of the defendant which was the proximate cause of the injury; but to authorize a recovery, the plaintiff must also show that such act resulted from culpable negligence by the defendant. *Cleveland City Ry. Co. v. Osborn*, 45.
2. *Action for injury by negligence—Absence of willfulness—Defendant not bound to exercise care toward injured*—An action to recover for an injury occasioned by negligence, the element of willfulness being absent, will not lie unless there exists between the defendant and the person injured a relation out of which there arises a duty of the former to exercise care toward the latter. *B. & O. S. W. Ry. Co. v. Cox, Admr.*, 276.
3. *Rule as to rate of speed for trains in absence of statute*—In the absence of a statute regulating the rate of speed of railroad trains, it is not negligence for a railroad company to run its trains, in the open country, at such rate of speed as those in charge of the same may deem safe to the transportation of passengers and property, unless there are facts and circumstances which, when taken in connection with a high rate of speed, would make such speed an element or factor in

 Negligence—Negotiable Instruments.

NEGLIGENCE—Continued.

- constituting negligence, and in such cases such facts and circumstances should be pleaded. *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.

4. *Doctrine of imputed negligence*—While the doctrine of imputed negligence does not prevail in this state, yet where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, must be regarded as the negligence of all. *Ib.*

Rule as to looking ahead before crossing railroad track—Duty of engineer as to looking ahead—Duty after discovering person approaching track—Bearing of obstructions to view of roadside—Rule as to negligence of one being negligence of all. *Ib.*

Action to recover for injury by passing train—Statement required in allegations. *Ib.*

Evidence concerning warning signals—Rule as to reasonable precaution by plaintiff—Erroneous charge to jury as to evidence—Contributory negligence of deceased. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

Employee of railroad company not required to be on main track—Is mere licensee—Subject to all risks—Company owes him no special duty. *Ib.*

Prosecution for manslaughter—Deceased unintentionally killed—Act of slayer must be prohibited by law—Not sufficient to show act a crime at common law or one of gross or culpable negligence. See *Johnson v. State*, 59.

Employee held to appreciate dangers from defects of which he might have had knowledge—Law of master and servant. See *Pennsylvania Co. v. McCurdy*, 118.

Conductor permitting person to ride on freight train—Does not bind company, when. See *B. & O. S. W. Ry. Co. v. Cor. Admr.*, 276.

NEGOTIABLE INSTRUMENTS—

Certificate of stock not a negotiable instrument, when—Certificate issued to secretary of company—By him assigned and delivered to *bona fide* holder—Not transferred on books—Fraudulently reobtained and delivered to third party—First assignee real owner. See *Farmers' National Bank v. Safe and Lock Co.*, 367.

Action on promissory note—Denial of execution and consideration. See *Booco v. Mansfield*, 121.

 New Trial—Office and Officers.

NEW TRIAL—

Party granted new trial—On condition of giving bond to secure possible judgment—Bondsmen estopped to deny validity of bond—When the trial court is of the opinion that a party is not in strict right entitled to a new trial, but grants to such party a new trial on condition that he give bond to pay any judgment which might be recovered on such new trial, and he complies with the condition and has the benefit of the new trial, the parties to such bond are estopped from claiming that such bond is invalid. Brenzinger v. Bank, 242.

NON-RESIDENCE—

Attachment does not apply to non-resident, when—Sec. 5521, Rev. Stat., as amended 93 O. L. 318. See *Hough v. Dayton Mfg. Co.*, 427.

NOTICE—

Summons issued on petition sufficient notice to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

There is no presumption that an agent to procure a policy of insurance has authority, after the policy is issued and delivered, to receive notice of cancellation—Such authority may, however, be directly given or may be inferred from course of dealing. See *Johnson v. Insurance Co.*, 6.

Notice of intention to appeal by one in fiduciary capacity—Requirements of statute—Sec. 6408, Rev. Stat. See *Brown v. Wallace*, 57.

NOVATION—

Contract of employment—May be discharged as to employer by assumption of third person with knowledge and consent of employe—Consent may be proved by parol or implication—Duty of court in charging jury as to implied novation. See *Union Central Life Ins. Co. v. Hoyer*, 344.

OFFICE AND OFFICERS—

1. *Persons succeeding defendants in office—Without authority to possess property of the office unless act of appointment is valid—Persons claiming to be the appointed successors of defendants in office, and to be entitled to the possession of property pertaining to such office, are without authority to make the relation in an action in mandamus to compel its delivery to them, unless the act under which they were appointed is valid. State ex rel. v. Jones*, 453.

Office and Officers—Parties.

OFFICE AND OFFICERS—Continued.

County officers are not local officers—Part of state organization—Subject of compensation not one of local nature—Laws must operate uniformly—Acts 92 O. L. 597 and 93 O. L. 507, relating to Pickaway county, invalid. See *State ex rel. v. Yates, Audr.*, 546; *State ex rel. v. Garver*, 555.

Mandamus may issue commanding governor to perform ministerial duty, but not to control discretion—Duty and power of appointment conferred by legislature—Art. 2, Sec. 27, Const.—Function is ministerial, not executive—Vacancy must be filled by appointment under Sec. 81, Rev. Stat.—Term of office of appointee. See *State ex rel. v. Nash, Governor*, 612.

Treasurer of school district must account for interest on deposit—Sec. 6841, Rev. Stat. See *Eshelby v. Cincinnati Bd. of Ed.*, 71.

Compensation of county commissioners for expenses in official duty—Sec. 897, Rev. Stat.—Expenses of personal character, though incurred while engaged in county business—Allowance of invalid claim—No bar to recovery. See *Richardson v. State*, 108.

How county auditors may determine apportionate valuation of rolling stock. See *State v. Aldridge*, 598.

OIL LEASE—

See GAS AND OIL LEASES (p. 605).

ORDINANCES—

Evidence as to existence of city ordinance—Parol testimony not admitted, when. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

PARENT AND CHILD—

Testatrix having child living devises all estate to husband—An after-born child will inherit from mother as heir at law. See *German Mutual Ins. Co. v. Lushey*, 233.

Wrongful death—Damages—Father being negligent not entitled to recovery for injury to son. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

PAROL EVIDENCE—

See EVIDENCE (pp. 509, 598).

PARTIES—

Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not a real party in interest, when—Secs. 4993 and 4995, Rev. Stat. See *Brown v. Ginn*, 316.

Parties—Perjury.

To avoid multiplicity of suits—Court may demand single action of several parties, when—Several actions against same defendants—Defendant may ask for consolidation of suits and for injunction. See *Taylor v. Brick Co.*, 360.

To estop state, record must show that state authorized previous action—Estoppel by statute, not *in pais*. See *State v. Cincinnati Tin & Japan Co.*, 182.

Mandamus to fill office of lieutenant governor—Private citizen may be relator. See *State ex rel. v. Nash, Governor*, 612.

Summons issued on petition—Cross-petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

PARTNERSHIP—

Corporation cannot be a member of a partnership—Credit due two corporations united for joint business—Not partnership assets—Money in hands of third person for two such corporations—Half belongs to each—Garnishment—Illegal combination to regulate prices—Proceeds not tainted. See *Geurinck v. Alcott*, 94.

PERJURY—

*Indictment for perjury—To warrant conviction—Must be at least one witness to corpus delicti—With corroborating witness or circumstantial evidence—Evidence—*It is a general rule, that to warrant a conviction under an indictment for perjury, there should be at least one witness to the *corpus delicti*, or the falsity of the matter assigned as perjury, and that the testimony of such witness be corroborated, either by another witness, or by circumstantial evidence sufficiently strong to satisfy the jury beyond a reasonable doubt of the guilt of the accused. *State v. Courtright*, 35.

A charge that "It is a rule of criminal law in the trial of perjury that you cannot find a man guilty of perjury upon the testimony of one witness alone, but it must be corroborated by another witness, or if not by another witness, then by circumstances which are practically equivalent to the testimony of another witness" held erroneous as placing the standard of corroborating proof too high. See *State v. Courtright*, 35, 38.

Where a person is called upon to meet the charge of perjury in giving a denial of his guilt in a prosecution for adultery, his sworn statement to that effect still stands as his evidence, and in addition thereto is the legal presumption of innocence of perjury, which requires the state to do much more than reintroduce the circumstantial evidence upon which he was tried for adultery. See *State v. Courtright*, 35, 42.

 Personal Injuries—Pleading.

PERSONAL INJURIES—

Husband has right of action at common law against one who wrongfully injures his wife—Right not abridged by Secs. 3108 and 3117, Rev. Stat. See *B. & O. R. R. Co. v. Glenn*, 395.

Action to recover for injury by passing train—Statement required in allegation. See *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.

Action for—Plaintiff must, to recover, prove culpable negligence, when. See *Cleveland City Ry. Co. v. Osborn*, 45.

Passenger injured by sudden stopping of car to avoid collision—*Damnum absque injuria*. *Ib.*

Duty and liability of railway company towards employe on track not in discharge of duty. See *Railway Co. v. Workman*, 509.

Restrictions as to entering and leaving trains—Plaintiff injured when about to step on car. See *Huston v. Insurance Co.*, 246. See also NEGLIGENCE (p. 276); MASTER AND SERVANT (p. 118).

PERSONAL PROPERTY—

Sale of goods—Title passes immediately, when—*Contra* rule. See *Bonham v. Hamilton*, 82.

Apportionate valuation of rolling stock. See *State v. Aldridge*, 598.

PERSONAL REPRESENTATIVES—

Personal representative of executor—Not liable to administrator *de bonis non*, when—Sec. 6020, Rev. Stat. See *Jones v. Willis*, 114.

PETITION—

See PLEADING (pp. 290, 326).

PICKAWAY COUNTY—

Acts, 92 O. L., 597 and 93 O. L., 507, relating to compensation of county officers, unconstitutional. See *State ex rel v. Yates, Audr.*, 546.

PLEADING—

1. *Action on promissory note—Denial of execution—Not inconsistent with claim of nonconsideration—Pleadings*—In an action on a promissory note, a denial of its execution and delivery is consistent with a separate ground of defense, that the note is without consideration. *Booco v. Mansfield*, 121.

2. *When both defenses are made—Plea in general term—Error to require defendant to make same definite and certain,*

Pleading.

- when*—When both defenses are made, and the plea of want of consideration is in general terms, it is error for the court to require the defendant to make the same definite and certain "by setting forth the facts and circumstances connected with the note which render it without consideration," and the error is continued in striking the defense from the answer for noncompliance with such order. The case of *Chamberlain v. Railway Co.*, 15 Ohio St., 225, distinguished. *Ib.*
3. *Mortgage foreclosure—Allegations necessary by mortgagor*—In an action for foreclosure of a mortgage, in which there are neither the proper averments nor a prayer, upon which to found a personal judgment, it is error to adjudge or decree that a defendant shall pay the whole amount of the debt secured by the mortgage, and to award execution therefor. *Southward v. Jamison*, 290.
4. *To bind party assuming and agreeing to pay mortgage debt—Pleadings*—In an action to foreclose a mortgage, after the proceeds of the sale of the mortgaged premises have been exhausted, the court cannot award execution or render judgment for any balance due, against a person who has assumed and agreed with the mortgagor to pay the mortgage debt, unless the plaintiff elects to avail himself of the agreement to assume and pay, and alleges the same against the person assuming the mortgage debt, and the latter has been summoned to answer such claim. *Ib.*
5. *Pleading—Motion to require pleading to make definite and certain, when*—When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, and a motion is made to require such pleading to be made definite and certain, it is error to overrule such motion. *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.
6. *Action to recover for injury by passing train—Statement required in allegation*—In an action founded upon negligence the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and that statement being made, it is sufficient to aver that such acts were carelessly or negligently done, or omitted. *Ib.*
- Proceedings in contempt against party refusing to comply with decree for alimony, complaint need not allege party able to pay—Burden on defendant to prove inability. See *State, etc., v. Cook*, 566.
- Rate of speed for trains in absence of statute—When an element or factor in constituting negligence—Should be pleaded. *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.

Pledges—Powers.

PLEDGES—

1. *Transfer of warehouse receipt or chose in action—Valid without actual delivery—As collateral security for loan—Pledgor requests first pledgee to transfer security to second creditor—A written pledge or transfer of an interest in warehouse receipts, or choses in action to secure a debt, is valid, without actual or manual delivery, where such receipts or choses in action are being held by another creditor on pledge as collateral security for a loan of money made by him to the same pledgor, or transferrer, the second pledge or transfer being equivalent to actual delivery of the property pledged or transferred; and a request by the pledgor or transferrer to his first pledgee, that when his debt is paid he deliver the collateral to his other creditor, constitutes sufficient possession of the collateral by such other creditor. Hunt v. Bode, 255.*
2. *Assignment of pledgor within ninety days after transfer of security—Not fraudulent—Application of Sec. 6343, Rev. Stat.—If the pledgor or transferrer file a deed of assignment within ninety days after making such pledge or transfer to secure the second creditor, the same will not be deemed and held to be fraudulent and void as to the assignee under the provisions of Sec. 6343, unless the pledge or transfer was in contemplation of insolvency; or, with a design to prefer one or more creditors to the exclusion in whole or in part of others; or, with intent to hinder, delay or defraud creditors. Ib.*

Certificate of stock issued to secretary of company—By him assigned and delivered to bona fide holder—Not transferred on books of company—Fraudulently reobtained and delivered to third party—First assignee real owner. See Farmers' Bank v. Safe & Lock Co., 367.

POLICE—

Act to organize and support police force of a city confers corporate power—Act of April 27, 1902, (Toledo) is void—Query as to Sec. 6, Art. 12, Const.—Query as to invalidity on other grounds. See State ex rel. v. Jones, 453.

POWERS—

State has sovereign powers except as limited by the constitution of the United States—Rules as to limitation of power to tax privileges and franchises. See Southern Gum Co. v. Laylin, 578.

Powers—Principal and Agent.

The constitution of Ohio does not recognize such a power as administrative power—It provides only for legislative, executive and judicial powers, and what is denominated in some other states as administrative power falls in Ohio within one of the three great powers recognized by our constitution. See *Harmon v. State*, 249, 253.

Power to issue bonds for city hospital is corporate power—Inhibited by Sec. 1, Art. 13, constitution—No exception on account of emergency—See *Cincinnati v. Trustees (Hospital)*, 440.

Whether act of April 27, 1902 (Toledo police board), authorizing appointment of board by governor, confers upon such officer powers which he is not competent to receive, *query*. See *State ex rel. v. Jones*, 453.

Act to organize and support police force of a city confers corporate power—Act of April 27, 1902, (Toledo) is void. *Ib*.

Act to take effect when majority of voters declare in its favor—Passed upon approval of authority of the general assembly—Unconstitutional. *State ex rel. v. Garver*, 555.

Corporate powers embrace all the powers which, within the observation of those who framed and adopted the constitution, were conferred upon and exercised by all the cities of the state. See *State ex rel. v. Jones*, 489.

Act of March 16, 1891, 88 O. L., 105, is special act conferring legislative power (in the city of Cleveland) and is repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Beacom*, 491.

PRACTICE—

See PLEADING (p. 121).

PRESUMPTIONS—

There is no presumption that an agent to procure a policy of insurance has authority, after the policy is issued and delivered, to receive notice of cancellation—Such authority may, however, be directly given or may be inferred from course of dealing. See *Johnson v. Insurance Co.*, 6.

PRINCIPAL AND AGENT—

Assent of would-be principal of no effect where act is done by one professing and having no authority as agent—Ratification of an act done without authority can be effectual only where the act is done by one professedly acting in the name of the party sought to be charged as principal, or for his benefit. And where the one who does the act neither has

Principal and Agent—Public Officers.

PRINCIPAL AND AGENT—Continued.

nor professes to have authority to represent another, the subsequent assent of such other to be bound as principal has no operation. *Johnson v. Insurance Co.*, 6.

There is no presumption that an agent to procure a policy of insurance has authority, after the policy is issued and delivered, to receive notice of cancellation—Such authority may, however, be directly given or may be inferred from course of dealing. *Ib.*

The election of assured to sue one of two insurance companies does not have the effect of ratifying the act of an insurance agent representing defendant and another company, in entering upon his policy ledger an unauthorized cancellation. *Ib.*

PRINCIPAL AND SURETY—

Action on bond of executor—Bond approved by probate court—Bond recites appointment of executor and directions as to execution of administration by executor—Sureties estopped to deny due appointment of executor or that will was duly probated. See *Hoffman v. Fleming*, 143.

PROBATE—

Sureties on bond of executor estopped to deny appointment of executor or probate of will, when. See *Hoffman v. Fleming*, 143.

PROBATE COURTS—

Whatever is done by the probate court in the matter of probate of wills, appointment of executors and administrators and directing and controlling the accounting of such executors and administrators, is presumptively within the jurisdiction of the court. See *Hoffman v. Fleming*, 143, 156.

PROMISSORY NOTE—

Action on promissory note—Denial of execution and consideration. See *Booco v. Mansfield*, 121.

PROOF—

See PERJURY (pp. 35, 38).

PUBLIC FUNDS—

Treasurer of school district must account for interest on deposits—Sec. 6841, Rev. Stat. See *Eshelby v. Cincinnati Bd. of Ed.*, 71.

PUBLIC OFFICERS—

See OFFICE AND OFFICERS (p. 735, Index).

Public Policy—Railroads.

PUBLIC POLICY—

Contingent fee to collector, champertous, when—Against public policy. See *Brown v. Ginn*, 316.

Illegality of combination to regulate prices—Proceeds not tainted with illegality, when. See *Geurinck v. Alcott*, 94.

PUNCTUATION—

See STATUTES (p. 625).

RAILROADS—

1. *As between person about to cross and the train, the latter has right of way*—As between a person about to cross over a railroad at a crossing, and a train of cars approaching such crossing, the train has the right of way. This is so because the person can stop within a few feet, and the train cannot. *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.
2. *Rule as to looking ahead before crossing*—The looking required before going upon a crossing, should usually be just before going upon the track, or so near thereto as to enable the person to get across before a train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach such crossing. *Ib.*
3. *Duty of engineer as to looking ahead*—*Duty after discovering person approaching track*—It is the duty of a locomotive engineer to keep a lookout on the track ahead of the train. If while so doing his eye takes in a person approaching the track, he may assume that such person will keep away from the track until the train passes; but when it becomes evident that such person will not keep off the track, it becomes the duty of such engineer to use ordinary care to prevent injury to such person, his first and highest duty, however, being for the safety of the passengers and property in his charge for transportation. *Ib.*
4. *Bearing of obstructions to view of roadside*—As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right of way, it is not required to take such things into consideration when approaching a crossing. *Ib.*
5. *Rule as to negligence of one being negligence of all*—Whatever a locomotive engineer, and those with him on the engine, would see while in the proper discharge of their respective duties, they are chargeable with having seen. *Ib.*
6. *Sections 3336 and 3337, Rev. Stat.*—*For protection of whom*—Revised Statutes, sections 3336 and 3337 are intended for the protection of such persons only as are crossing the track or

 Railroads—Real Property.

RAILROADS—Continued.

are about to do so; and they do not inure to the benefit of persons who are on the track and not at a crossing. *Railroad Co. v. Depew*, 40 Ohio St., 121, approved and followed. *Cleveland, A. & C. Ry. Co. v. Workman, Admr.*, 509.

Apportionment of valuation of railway property—Sec. 2774, Rev. Stat.—How property belonging to railroad division should be apportioned—Apportionment of property of division or branch among counties—Taxation of rolling stock—How determined by county auditor—Minutes of taxing board not conclusive—Real facts may be shown by parol. See *State ex rel. v. Aldridge*, 598.

Interurban railroad on side of highway—An interference with easement and right of way of abutting farms, when—Conditions similar to those of steam railways—Effect of construction of electric plant in connection—Injunction. See *Schaaf v. Railway Co.*, 215.

Sections 3336 and 3337, Rev. Stat., as to signals, are for protection of persons crossing—Not for those on track not at crossing. See *Cleveland, A. & C. Ry. Co. v. Workman, Admr.*, 509.

Employee of railroad not required to be on main track—Is mere licensee—Subject to all risks—Company owes him no special duty. *Ib.*

Rule as to rate of speed for trains in absence of statute. See *N. Y. C. & St. L. R. R. Co. v. Kistler*, 326.

Conductor permitting person to ride on freight train—Does not bind company, when. See *B. & O. Ry. Co. v. Cox*, 276.

Locomotive engineer chargeable with having seen what he would see in discharge of duty. See *Railroad v. Kistler*, 327.

See also CARRIERS (p. 276).

RATIFICATION—

Assent of would-be principal of no effect where act is done by one professing and having no authority as agent. See *Johnson v. Insurance Co.*, 6

See also PRINCIPAL AND AGENT (pp. 6, 13).

REAL ACTIONS—

See ACTIONS (p. 182).

REAL PROPERTY—

Party having title demising to another—First party cannot maintain action against third party, when. See *State v. Cincinnati Tin & Japan Co.*, 182.

Records—Riparian Rights.

RECORDS—

Record of action to be a bar or *res adjudicata*—Must show party sought to be barred was party to former action—To estop state must show that state authorized previous action. See *State v. Cincinnati Tin & Japan Co.*, 182.

A record of the appointment of an executor in Ohio for the estate of a person "late of Brooke county, West Va." does not impeach itself by clearly showing that testatrix was not a resident of the jurisdiction which made the appointment. The word *late* is not used in the sense of *last*, but of *recently* or *formerly*. See *Hoffman v. Fleming*, 143, 157.

RENTAL—

See GAS AND OIL LEASE (p. 605).

REPLEVIN—

Sale of goods by administrator upon terms of credit with approved security—Failure of security and resale—Title does not pass, when—Replevin will not lie. See *Bonham v. Hamilton*, 82.

RES ADJUDICATA—

Record of action to be a bar or *res adjudicata*—Must show party sought to be barred was party to former action—To estop state record must show that state authorized the previous action. See *State v. Cincinnati Tin & Japan Co.*, 182.

RIPARIAN RIGHTS—

Municipality a riparian proprietor—May use water needed from stream flowing by—Use of water by municipality for domestic purposes—Lower proprietor has no cause for complaint—When water is insufficient for upper and lower proprietors, each entitled to reasonable use—Water should be so divided that each shall bear fair proportion of loss—Municipality cannot diminish flow, to injury of lower proprietor, to supply persons outside municipality or use for manufactories more than a reasonable share—Equitable division, a question for jury. See *Canton v. Shock*, 19.

Inasmuch as a city has the right to supply water to its inhabitants for domestic and manufacturing purposes, the relative rights of riparian proprietors are not affected by the fact that the supply is for pay rather than for nothing. *Ib.* 19, 32.

The water taken by a city from a stream for its own use, and supplied to its inhabitants, is taken by virtue of its rights as riparian proprietor and not by virtue of the right of eminent domain. *Ib.* 33.

 Roberts Law—Schools.

ROBERTS LAW—

Protection of life and property from incompetency of engineers, etc.—Act of March 1, 1900, 94 O. L. 33—Act invalid as in conflict with Sec. 2, bill of rights, and Sec. 1, Art. 2, of the constitution. See *Harmon v. State*, 249.

ROLLING STOCK—

See RAILROADS (p. 598).

ROYER ACT—

93 O. L. 255, amending 6710, Rev. Stat. construed—effect. See *Slingluff v. Weaver*, 621.

SALARIES—

Salary law in Pickaway and Holmes counties held unconstitutional. See *State ex rel. v. Yates, Audr.*, 546; *State ex rel. v. Garver*, 555.

SALES—

1. *Sale of goods—Title passes immediately, when—Contra rule*—It is a general rule that, in case of the sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. *Bonham v. Hamilton*, 82.

2. *Sale of goods by administrator upon terms of credit with approved security—Failure of security and resale—Title does not pass, when—Replevin will not lie*—Where, at an administrator's sale of goods, upon terms of credit of nine months with approved security, a bid is accepted, but it is stipulated that the transaction is to be a sale if surety be given by ten o'clock the next day, but if not given the goods to be again offered for sale, and the sureties tendered by the bidder are not approved by the administrator, and the goods are thereupon offered and sold to another, the title to the goods does not pass to the first bidder, and he cannot maintain replevin for their possession. *Ib.*

Sale of goods by correspondence contract—Cannot change contract, when—Law of sales. See *Bellaire Stove Co. v. Midland Steel Co.*, 1.

SCHOOLS—

Treasurer of school district must account for interest on deposits—Section 6841, Rev. Stat.—The treasurer of a school

 Schools—State.

district who, under favor of the proviso of section 6841, Revised Statutes, deposits its funds in a bank which allows interest on the average balance of the deposit is required to account to the school district for such interest. *Eshelby v. Cincinnati Board of Education*, 71.

SIGNALS—

Sections 3336 and 3337, Rev. Stat., for protection of persons at crossing—Not for those on track not at crossing. See *Cleveland, A. & C. Ry. Co. v. Workman, Admr.*, 509.

Evidence concerning warning signals—Rule as to reasonable precaution by plaintiff—Erroneous charge to jury as to evidence—Contributory negligence of deceased. *Ib.*

SPEED—

See NEGLIGENCE (p. 326).

SPECIAL LAWS—

Construction of bridge over Maumee—Invalidity of act of April 14, 1900—Conflict with article 13, section 1, and article 2, section 26 of constitution—Classification of cities. See *Platt v. Craig*, 75.

Act of April 29, 1902, to issue bonds for city hospital in Cincinnati is special law conferring corporate power. See *Cincinnati v. Trustees (Hospital)*, 440.

Act of March 16, 1891, 88 O. L., 105, is a special law conferring legislative power (in the city of Cleveland) and is repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Beacom*, 491.

Construction of legislative acts—Classification of cities repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Jones*, 453.

See also CONSTITUTIONAL LAW (p. 75).

STATE—

County officers part of the state organization—Subject of compensation not one of local nature. See *State ex rel. v. Yates, Audr.*, 546, and *State v. Garver*, 555.

State is sovereign except as limited by constitution—Rule as to limitation of power to tax privileges and franchises. See *Southern Gum Co. v. Laylin*, 578.

Res adjudicata—To estop state, record must show that state authorized the previous action. See *State v. Cincinnati Tin & Japan Co.*, 182.

Action by to recover canal lands—State must introduce specifications of canals, but not epitome of specifications—Sec. 218-

 State—Statutes.

STATE—Continued.

223, Rev. Stat., attempting to make maps *prima facie* evidence unconstitutional, when—Application of Sec. 19, bill of rights—To recover canal lands must prove former ownership. *Ib.*

STATUTES—

1. *Object of judicial investigation to ascertain intent of legislature—Method of consideration—Punctuation—*The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted. *Slingluff v. Weaver*, 621.
2. *Intent to be sought in language employed—Meaning if plainly expressed to be enforced—*But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction. *Ib.*

Section 3 of the act of April 26, 1898, 93 O. L., 318, amending Sec. 5521, Rev. Stat., relating to grounds of attachment, and which amendment, in enumerating such grounds, omitted nonresidence, providing that "this act, shall not extend to or affect any existing debt, contract, note or judgment" relates to a then existing cause of action and not to a cause or ground of attachment. See *Hough v. Manufacturing Co.*, 427, 438.

Attachment does not apply to nonresident, when—Sec. 5521, Rev. Stat. *Ib.* 427.

Apportionment of valuation of railway property among counties—Sec. 2774, Rev. Stat. See *State ex rel. v. Aldridge*, 598.

Vacancy in office of lieutenant governor must be filled by appointment under Sec. 81, Rev. Stat.—Term of office of such appointee—Sec. 11, Rev. Stat. See *State ex rel. v. Nash, Governor*, 612.

Statutes.

- Royer act, 93 O. L. 255, construed—Effect—Sec. 6710, Rev. Stat. See *Slingluff v. Weaver*, 621.
- Compensation of county commissioners for expenses in official duty—Sec. 897, Rev. Stat.—Expenses of personal character though incurred while engaged in county business—Allowance of invalid claim—No bar to recover back. *Richardson v. State*, 108.
- Construction of bridge over Maumee river—Act of April 14, 1900, 94 O. L., 175, in conflict with Art. 13, Sec. 1, and Art. 2, Sec. 26, of the constitution. See *Platt v. Craig*, 75.
- Trial by jury—General or special verdict—Sec. 5201, Rev. Stat.—Mandatory, when. See *Gale v. Priddy*, 400.
- Title of municipal corporation to streets dedicated—Sec. 2601, Rev. Stat. *Callen v. Electric Light Co.*, 166.
- Husband's right of action not abridged by Secs. 3108 to 3117, Rev. Stat., See *B. & O. Ry. Co. v. Glenn*, 395.
- Section 6409, Rev. Stat.—Transcript of entries in probate court filed in common pleas to perfect appeal—May be amended under Sec. 5114, Rev. Stat. See *Falconer v. Martin*, 352.
- Personal representatives of executor—Not liable to administrator *de bonis non*, when—Sec. 6020, Rev. Stat. See *Jones v. Wilks*, 114.
- Treasurer of school district must account for interest on deposits—Sec. 6841, Rev. Stat. See *Eshelby v. Cincinnati Bd. of Ed.*, 71.
- Notice of intention to appeal by one in fiduciary capacity—Requirements of Sec. 6408, Rev. Stat. See *Brown v. Wallace*, 57.
- Act of April 11, 1902, imposing tax of one-tenth of one per cent. on capital stock of corporations valid. See *Southern Gum Co. v. Laylin*, 578.
- Money decree for alimony not a debt within constitutional inhibition against imprisonment. Is punishable order under Sec. 5640, Rev. Stat., for contempt. See *State, etc. v. Cook*, 566.
- Sections 3336 and 3337, Rev. Stat., as to signals, are for protection of persons at crossing—Not for those on track not at crossing. See *Cleveland, A. & C. Ry. Co. v. Workman, Admr.*, 509.
- Act of April 26, 1902, relating to Commercial hospital of Cincinnati, in conflict with Sec. 1, Art. 13, of the constitution. See *Cincinnati v. Trustees (Hospital)*, 440.
- Construction of legislative acts—Classification of cities—Repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Jones*, 453.

 Statutes—Street Railways.

STATUTES—Continued.

- Act to take effect when majority of voters declare in its favor—Passed upon approval of authority other than general assembly—Unconstitutional. See *State ex rel. v. Garver*, 555.
- Acts 92 O. L., 597 and 93 O. L., 507, Pickaway county, and 93 O. L., 660, Holmes county—Salary laws—Unconstitutional. See *State ex rel. v. Yates, Audr.*, 546; *State ex rel. v. Garver*, 555.
- Act of March 16, 1891, 88 O. L., 105, federal plan law is repugnant to Sec. 1, Art. 13, of the constitution. See *State ex rel. v. Beacom*, 491.
- Testatrix having child living devises all estate to husband—An after-born child will inherit from mother as heir at law—Sec. 5961, Rev. Stat. See *German Mutual Ins. Co. v. Lushey*, 233.
- Assignment of pledgor within ninety days after transfer of security—Not fraudulent—Application of Sec. 6343, Rev. Stat. See *Hunt v. Bode*, 255.
- Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection—Such assignee not a real party in interest, when—Secs. 4993 and 4995, Rev. Stat. See *Brown v. Ginn*, 316.
- Section 218-223 (Bates)—Attempt to make maps, etc., *prima facie* evidence, unconstitutional, when. See *State v. Tin & Japan Co.*, 182.

STOCK CERTIFICATE—

See CORPORATIONS (p. 367).

STREET RAILWAYS—

1. *Interurban railroad on side of highway—An interference with easement and right of way of abutting farms, when—Condition similar to those of steam railways—*The construction and operation of an interurban railroad laid with T rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway—the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter and government mail, is an additional burden on the public highway and obstruction to, and interference with the plaintiffs' easements and rights therein, not substantially different from those that are imposed by the construction and operation of steam railroads, under like conditions. *Schaaf v. Railway Co.*, 215.

Street Railways—Streets.

2. *Effect of construction of electric plant in connection with such railway*—The construction and operation of an electric plant in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another additional burden which is an invasion of the plaintiffs' property rights. *Ib.*
 3. *Plaintiff entitled to injunction, when*—The plaintiffs are entitled to injunction, in such case, to prevent the construction and operation of such railroad, and of such electric plant, or either, until compensation and damages shall be assessed them in a proper appropriation proceeding, and paid, or secured to be paid. *Ib.*
- Passenger injured by sudden stopping of the car to avoid collision. See *Cleveland City Ry. Co. v. Osborn*, 45.

STREETS—

1. *Title of municipal corporation to streets dedicated*—*Sec. 2601, Rev. Stat.*—The title which a municipal corporation acquires under *Sec. 2601, Rev. Stat.*, to streets dedicated by a proprietor who subdivides lots for sale, is held for the use of the public for street purposes. *Callen v. Electric Light Co.*, 166.
2. *Property interest of abutting owner in street—Compensation*—An owner of a lot abutting on such street has a property interest in the street in front of his lot which cannot be taken against his will except upon the terms provided by the constitution, viz.: That a compensation shall first be made in money or by a deposit of money. *Crawford v. Delaware*, 7 Ohio St., 459; *Railway Co. v. Cummins*, 14 Ohio St., 523, and *Railway Co. v. Lawrence*, 38 Ohio St., 41, approved and followed. *Ib.*
3. *Placing of poles on curb by private lighting company—Abuse of property rights, when*—*Sec. 19, bill of rights*—The placing by a private lighting company of poles at the curb in a street, and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner within the meaning of section 19 of the bill of rights. And such placing of poles, lines and wires is none the less an unauthorized taking even though it be consented to by the city authorities. *Ib.*
4. *Lot owner's right to injunction*—And where it appears that the acts of the lighting company in so placing its poles, lines and wires were done without the knowledge or consent of the

Streets—Taxation.

STREETS—Continued.

lot owner, and that their maintenance will work injury to his property, appreciable in character and amount, such owner has a right to an injunction against such maintenance and an order for removal. *Ib.*

SUMMONS—

*Summons issued on petition—Sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition—*So long as a cross-petition in an action is strictly confined to "matters in question in the petition," the summons issued on the petition would be sufficient notice to sustain a judgment rendered on the cross-petition; but when the cross-petition sets up matters which are not drawn "in question in the petition," and seeks affirmative relief against a codefendant, of a nature different from that sought in the petition, a summons to the party to be charged, issued on the petition, will not confer jurisdiction to render judgment on the cross-petition, especially when the cross-petition is filed after the defendant thereto is in default for answer to the petition, and a summons on the cross-petition in such case is necessary. *Brown v. Kuhn et al.*, 40 Ohio St., 468, explained and qualified. *Southward v. Jamison*, 290.

*Pleading—*To bind party assuming and agreeing to pay mortgage debt—*Summons. Ib.*

SUPREME COURT—

Effect of construction of Royer act. See *Stingluff v. Weaver*, 621.

SURETY—

See PRINCIPAL AND SURETY (p. 143)

TAXATION—

1. *Lands owned by municipality—Not exempt from taxation—Unless used in municipal function—Same when lands leased—Municipal law—*The ownership of lands by a municipal corporation does not bring them within any statutory exemption from taxation unless they are used in the exercise of a municipal function, and this is true although they are leased by the municipality and the money realized is applied to a public purpose. *Cincinnati v. Lewis, Auditor*, 49.
2. *State is sovereign except as limited by constitution—*The state is a sovereignty, with sovereign powers, except as limited by the constitution of the United States. *Southern Gum Co. v. Laylin*, 578.

Taxation.

3. *Rule as to limitation of power of general assembly to tax privileges and franchises*—While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare. *Ib.*
4. *Limitation of such taxes not to exceed reasonable value—Determination in general assembly—Finally in courts*—By reason of these limitations a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter. The determination of such values rests largely in the general assembly, but finally in the courts. *Ib.*
5. *Excise tax may be imposed, when*—An excise tax may also be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption, in part at least, of the individuals composing such body from liability for its debts. *Ib.*
6. *Franchise tax may be imposed upon domestic and foreign corporations*—A franchise tax may be imposed by the general assembly upon corporations, both domestic and foreign, doing business in this state. *Ib.*
7. *Tax of one-tenth of one per cent. on capital stock—Act of April 11, 1902, valid*—The tax of one-tenth of one per cent. on the subscribed or issued and outstanding capital stock of corporations as provided for in the act of April 11, 1902, entitled "An act to require corporations to file annual reports with the secretary of state, and to pay annual fees therefor," is a franchise tax, and not a tax on property. Said act is a valid constitutional law. *Ib.*
8. *Apportionment of valuation of railway property—Sec. 2774, Rev. Stat.*—The words, "belongs to * * * any one of such divisions or branches," in section 2774, Revised Statutes, has reference to cases in which a division or branch of a railroad is separately equipped; and in such cases its rolling stock, while owned by the company, is regarded as belonging to such division or branch for operating purposes, and the value thereof is required by said section to be apportioned for taxation, among the counties through, or into, which the track of said division or branch extends. *State ex rel. v. Aldridge, 598.*

Taxation—Toledo.

TAXATION—Continued.

9. *How property belonging to railroad division should be apportioned*—If the rolling stock does not so belong to a division or branch, but is used solely thereon, the value thereof is required by said section to be apportioned for taxation, the same as if such rolling stock so belonged to said division or branch. *Ib.*
 10. *Apportionment of property of division or branch among counties*—The value of so much of the rolling stock as does not so belong to the main line or to a division or branch, and is not solely used thereon, is required by said section to be apportioned for taxation among all the counties, through, or into, which the road extends, in the same proportion that the length that such road in each county, bears to the entire length thereof in all said counties, including main line, divisions and branches. *Ib.*
 11. *Taxation of rolling stock—How determined by county auditors*—In apportioning the value of rolling stock, the board composed of the county auditors, should first ascertain the value of the rolling stock which belongs to, or is used solely on the main line, division or branches, and then ascertain the value of all the other rolling stock, and then apportion their valuations upon a mileage basis as required by said section 2774. *Ib.*
 12. *Minutes of taxing board not conclusive—Real facts may be shown by parol*—The minutes of a taxing board are not conclusive, and the real facts may be shown by parol, unless otherwise provided by statute. *Ib.*
- Power to issue bonds for city hospital and to levy tax therefor is corporate power—Inhibited by Sec. 1. Art. 13, constitution. See *Cincinnati v. Trustees (Hospital)*, 440.

TITLE—

- Of municipal corporation to streets dedicated—Sec. 2601, Rev. Stat. See *Callen v. Electric Light Co.*, 166.
- Sale of goods by administrator upon terms of credit with approved security—Failure of security and resale—Title does not pass, when. See *Bonham v. Hamilton*, 82.
- Sale of goods—Title passes immediately, when—*Contra* rule. *Ib.*

TOLEDO—

- Construction of bridge over Maumee river—Act 94 O. L., 175, applying only to Toledo, in conflict with Art. 13, Sec. 1, and Art. 2, Sec. 26, of the constitution. See *Platt v. Craig*, 75.

Toledo—Vendor and Purchaser.

Act to organize and support police force of a city confers corporate power—Act of April 27, 1902, (Toledo) is void. See *State ex rel. v. Jones*, 453.

TRANSCRIPT—

Of entries of probate court filed in common pleas to perfect appeal—May be amended under Sec. 5114, Rev. Stat. See *Falconer v. Marvin*, 352.

TREASURER—

Of school district must account for interest on deposits—Sec. 6841, Rev. Stat. See *Eshelby v. Cincinnati Bd. of Ed.*, 71.

TRIAL—

Equitable division of water between riparian proprietors a question for the jury. See *Canton v. Shock*, 19.

By jury—General or special verdict requests—Sec. 5201, Rev. Stat.—Mandatory, when. See *Gale v. Priddy*, 400.

Trial court to exercise power of refusal to permit questions with great caution. *Ib.*

TRUSTS AND TRUSTEES—

Illegality of combination to regulate prices—Proceeds not tainted with illegality, when—While a combination to regulate prices and control output, may be against public policy and illegal, the money arising as the fruits of such combination, when placed in the hands of a third person for one of the members thereof, ceases to be tainted by such illegality, and becomes honest money, subject to seizure and sequestration by garnishee process, in favor of a creditor of such member. *Geurinck v. Alcott*, 94.

Accounts owned by different holders against same debtor—Assigned to one termed trustee for collection. Such assignee not a real party in interest, when—Not a trustee of an express trust—Secs. 4993 and 4995, Rev. Stat. See *Brown v. Ginn*, 316.

VACANCY—

See appointment (office) of lieutenant governor (p. 612).

VALUATION—

Apportionment of valuation of railway property among counties—Sec. 2774, Rev. Stat. See *State ex rel. v. Aldridge*, 593.

VENDOR AND PURCHASER

See SALES (p. 82).

Verdicts—Waters and Water Courses.

VERDICTS—

1. *Trial by jury—General or special verdict—Sec. 5201, Rev. Stat.*—A request that the court will direct the jury to render a special verdict in writing, upon any or all of the issues in the case, is not a request to instruct the jury that if they find a general verdict, they shall find specially upon particular questions of fact, as provided in Revised Statutes, section 5201. *Gale v. Priddy*, 400.
2. *Section 5201, Rev. Stat. mandatory only, when*—Revised Statutes, section 5201, so far as it relates to special findings upon particular questions of fact, is mandatory only when the request therefor contains the condition that the questions which are submitted shall be answered in case a general verdict shall be rendered. *Ib.*

WAREHOUSE RECEIPT—

See PLEDGES (p. 255).

WATERS AND WATER COURSES—

1. *Riparian rights—Municipality a riparian proprietor*—An incorporated municipality situated on a natural flowing stream, is, in its corporate capacity, a riparian proprietor, having the rights, and subject to the liabilities, of such proprietor. *Canton (City) v. Shock*, 19.
2. *Municipality may use water needed from stream flowing by*—Such municipality so situated has the right to use out of such stream all the water it needs for its own proper purposes, returning to the stream the water not consumed in such use. *Ib.*
3. *Use of water by municipality for domestic purposes—Lower proprietor no cause for complaint*—Such municipality so situated, may supply water to its inhabitants for domestic use, returning to the stream the water not consumed; and a lower proprietor who uses the water of the same stream for power, has no legal cause for complaint against such upper proprietor for so using the water of the stream. *Ib.*
4. *When water is insufficient for upper and lower proprietors, each entitled to reasonable use*—Where there are upper and lower proprietors upon a natural running stream, both having manufactories propelled by the water of the stream, and the water is insufficient to fully supply the needs of both, each one has a right to the reasonable use of the water, considering all the circumstances. *Ib.*
5. *Water should be so divided that each shall bear fair proportion of loss*—In such cases the water of the stream should be

Waters and Water Courses—Wills.

so divided and used that each proprietor shall bear his fair proportion of the loss caused by the shortage of water, considering all the circumstances of the case. *Ib.*

6. *Municipality cannot diminish flow of water, to injury of lower proprietor, to supply persons outside municipality—Or use for manufactories more than a reasonable share—* Such municipality so situated, has no right to materially diminish the flow of water in such stream, to the injury of a lower proprietor, by supplying water from the stream to persons outside of such municipality, or to be transported away from such city, or by supplying to manufactories for power purposes more than a reasonable share of the water, considering all the circumstances. *Ib.*

7. *Equitable division of use of water—A question for the jury—* In case of difference between such proprietors as to the use of water for power purposes, the question should be left to a jury to say whether under all the circumstances the party complained against has used more than his fair proportion of the water of the stream. *Ib.*

Inasmuch as a city has the right to supply water to its inhabitants for domestic and manufacturing purposes, the relative rights of riparian proprietors are not affected by the fact that the supply is for pay rather than for nothing. *Ib.* 19, 32.

The water taken by a city from a stream for its own use, and supplied to its inhabitants, is taken by virtue of its right as riparian proprietor, and not by virtue of the right of eminent domain. *Ib.* 19, 32.

WIFE—

See HUSBAND AND WIFE (p. 395).

WILLS—

Testatrix, having child living, devises all estate to husband—

An after-born child will inherit from mother as heir at law—

Law of wills— Where a testatrix, having a child living, devises all her estate to a third person (in this case her husband), without making provision in her will for an after-born child, such after-born child, if it survive the testatrix, by virtue of the provisions of Sec. 5961, Rev. Stat., will inherit from the mother as her heir at law, as if she died intestate, notwithstanding that by clear and explicit language in the will, such testatrix undertakes to disinherit such after-born child. *German Mutual Ins. Co. v. Lushey*, 233.

Whatever is done by the probate court in the matter of probate of wills, appointment of executors and administrators, and

Wills—Wrongful Death.

WILLS—Continued.

directing and controlling the accounting of such executors and administrators, is presumptively within the jurisdiction of the court. See *Hoffman v. Fleming*, 143, 156.

Securities on bond of executor estopped to deny appointment of executor or probate of will, when. See *Hoffman v. Fleming*, 143.

WITNESSES—

To warrant conviction for perjury there should be at least one witness to the *corpus delicti* with corroborating witness or circumstantial evidence: See *State v. Courtright*, 35.

Trial of criminal case—Testimony in previous trial by witness, not dead, but beyond jurisdiction—Not admissible, when. See *State v. Wing*, 407.

Court exercises power of refusal to permit questions with great caution. See *Gale v. Priddy*, 400.

WORDS AND PHRASES—

A record of the appointment of an executor in Ohio for the estate of a person "late of Brooke county, West Va.," does not impeach itself by clearly showing that testatrix was not a resident of the jurisdiction which made the appointment. The word *late* is not used in the sense of *last*, but of *recently* or *formerly*. See *Hoffman v. Fleming*, 143, 157.

WRIT AND PROCESS—

Summons issued on petition sufficient to sustain judgment on cross-petition, when—Cross-petition involving matter not in original petition—Requires summons to party charged in cross-petition. See *Southward v. Jamison*, 290.

Pleading to bind party assuming and agreeing to pay mortgage debt—Summons. *Ib.*

WRONGFUL DEATH—

Damages—Pecuniary injury to each beneficiary—Aggregate amount, how computed—Father being negligent not entitled to recover for injury to son. See *Cleveland, A. & C. Ry. Co. v. Workman*, 509.

E. J. M.

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